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North Dakota Supreme Court Review

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NORTH DAKOTA SUPREME COURT REVIEW

The Supreme Court Review briefly summarizes the important decisions rendered in 1983 by the North Dakota Supreme Court. The purpose of the review is to indicate cases of first impression and cases that significantly affect earlier interpretations of North Dakota law.

The following topics are included in the review:

ADMINISTRATIVE LAW

Garner Public School v. Golden Valley County Committee

In *Garner Public School v. Golden Valley County Committee*[1] Lone Tree Public School District (Lone Tree) appealed the decision of the district court for Golden Valley County, which reversed the order of the State Board of Public School Education approving the dissolution of Garner Public School.[2] On appeal Lone Tree claimed that the Golden Valley County Committee for Reorganization of School Districts' (County Committee) dissolution plan was not subject to direct judicial review under the North Dakota Administrative Agencies Practice Act.[3] Lone Tree further claimed that the supreme court should defer to the decisions of an administrative agency, in this case the State Committee for Reorganization of School Districts (State Committee), when reviewing school system dissolution plans.[4]

The supreme court agreed with Lone Tree and reversed the rulings of the district court.[5] The supreme court held that chapter 15-53.1 of the North Dakota Century Code[6] did not create a right to direct judicial review of the County Committee's decision when the committee was considering the dissolution of a single school district.[7] The supreme court stated that it exercises restraint when reviewing administrative agency findings and does not substitute its judgment for that of the agency.[8] The court, therefore, accepted the approved plan and remanded the issue to the State Committee for the purpose of holding a public hearing regarding the adjustment of the property, liabilities, and debts of Garner Public School.[9]

Hammond v. North Dakota State Personnel Board

In *Hammond v. North Dakota State Personnel Board*[10] Hammond

1. 334 N.W.2d 665 (N.D. 1983).
2. Garner Pub. School v. Golden Valley Country Comm., 334 N.W.2d 665, 666-67 (N.D. 1983).
3. *Id.* at 670. *See* N.D. CENT. CODE ch. 28-32 (1974 & Supp. 1983) (Administrative Agencies Practice Act).
4. 334 N.W.2d at 671.
5. *Id.* at 667.
6. *See* N.D. CENT. CODE ch. 15-53.1 (1981 & Supp. 1983) (annexation reorganization and involuntary dissolution of public school districts).
7. 334 N.W.2d at 671.
8. *Id.*
9. *Id.* at 674.
10. 332 N.W.2d 244 (N.D. 1983).

lost his job as an employee of the State. The State Personnel Board (Board) upheld his loss of employment, and Hammond appealed the decision to the district court.[11] Hammond then appealed from the district court judgment, which dismissed Hammond's administrative appeal, under chapter 28-32 of the North Dakota Century Code, for lack of subject matter juridiction.[12] Hammond raised two issues before the supreme court: whether the Board was an agency whose decisions are appealable under chapter 28-32[13] and whether the Board had authority to review dismissals of classified state employees.[14]

The Board contended that it was a division of the Office of Management and Budget, whose decisions cannot be appealed to the district court.[15] The supreme court held that the Board was not an office or division of the Office of Management and Budget and its final decisions, therefore, were not exempt from appeal to the district court under subsection 28-32-01 (1) (a) of the North Dakota Century Code.[16] The court also held that the Board was an administrative agency whose final orders and decisions were appealable to the district court,[17] and that the Board had authority to review dismissals of classified state employees.[18] The court, therefore, reversed and remanded the case to the district court for proceedings on the merits of Hammond's administrative appeal.[19]

BUSINESS ASSOCIATIONS

Voltz v. Dudgeon

In *Voltz v. Dudgeon*[20] Dudgeon appealed from a judgment for Voltz based upon a finding that a joint venture relationship existed between the parties.[21] Voltz employed Dudgeon to operate a grain truck that Voltz owned.[22] When the trucking operation was

11. Hammond v. North Dakota State Personnel Bd., 332 N.W.2d 244, 245 (N.D. 1983).
12. *Id.* The trial court concluded that the State Personnel Board did not have authority to confirm or deny terminations of employment from non-merit state agencies and that the Board's order, having no legal significance, was not a proper subject matter for appeal to district court. *Id. See* N.D. CENT. CODE ch. 28-32 (Administrative Agencies Practice Act) (1974 & Supp. 1983).
13. 332 N.W.2d at 245.
14. *Id.*
15. *Id.* at 246. *See* N.D. CENT. CODE § 28-32-01(1) (a) (Supp. 1983).
16. 332 N.W.2d at 246. *See* N.D. CENT. CODE § 28-32-01(1) (a) (Supp. 1983).
17. 332 N.W.2d at 246.
18. *Id.*
19. *Id.* at 245.
20. 334 N.W.2d 204 (N.D. 1983).
21. Voltz v. Dudgeon, 334 N.W.2d 204, 205 (N.D. 1983). The lower court initially held that a partnership existed between the parties. *Id.* at n. 1. However, upon a rehearing, the court concluded that no partnership existed, but a joint venture did exist. *Id.*
22. *Id.* at 205.

discontinued Voltz brought suit, alleging that a partnership existed between the parties and that Dudgeon was responsible for one-half of the expenses incurred during the course of the business.[23]

The North Dakota Supreme Court affirmed the lower court's finding that the parties were engaged in a joint venture.[24] The court stated that in addition to limitations on scope and duration, a joint venture must include contribution, joint proprietorship and control, sharing of profits but not necessarily of losses, and an express or implied contract.[25] The court found facts, including joint contributions to a common undertaking,[26] and conduct of the parties showing an implied agreement to share profits and losses associated with the operation of the truck,[27] which established a joint venture relationship in the operation of the trucking business.[28] In addition, the court held that Dudgeon was liable to Voltz for a loan that Dudgeon advanced to a third party without the prior approval of Voltz and that the loan was outside the scope of the joint venture.[29]

CIVIL PROCEDURE

Gauer v. Klemetson

In *Gauer v. Klemetsen*[30] the defendants appealed from the order of the district court dismissing their counterclaim for contribution or indemnity in a personal injury suit.[31] The supreme court considered whether the judgment or order for dismissal of the counterclaim was appealable.[32]

The supreme court stated that unless the district court order

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23. *Id.*

24. *Id.* at 206.

25. *Id.* at 206-07. The *Voltz* court followed the analysis of elements of a joint venture set forth by the Minnesota Supreme Court in Rehnberg v. Minnesota Homes, 236 Minn. 230, 52 N.W.2d 455 (1952). 334 N.W.2d at 206.

26. 334 N.W.2d at 206. Although Dudgeon did not contribute any funds to the business, he contributed his time, skill, knowledge, and expertise in driving and repairing the truck. *Id.* Dudgeon also maintained business records and oversaw the general operation of the venture. *Id.*

27. *Id.* at 206-07. Dudgeon testified that he expected to gain equity in the truck and subsequently to share in the profits of the operation. *Id.* at 207. Dudgeon also cosigned a retail installment contract with Voltz to purchase a truck in the name of the business. *Id.* Dudgeon's implied agreement to share in the losses was also evidenced by his willingness to receive compensation only when sufficient funds were present in the business checking account. *Id.*

28. *Id.* at 206-07.

29. *Id.* at 207.

30. 333 N.W.2d 436 (N.D. 1983).

31. Gauer v. Klemetson, 333 N.W.2d 436, 437 (N.D. 1983). The two defendants counterclaimed in a personal injury action alleging that one of the plaintiffs negligently contributed to the injury of the other plaintiff on the premises of the defendants' restaurant. *Id.*

32. *Id.*

directs entry of a final judgment pursuant to Rule 54 (b) of the North Dakota Rules of Civil Procedure the order of dismissal of a counterclaim is interlocutory and ordinarily cannot be appealed prior to entry of a final judgment in the main action.[33] The *Gauer* court asserted that the substantive issues raised by the defendants in their counterclaim had not been disposed by the dismissal order and that these issues might be raised and proved in the main action.[34] The defendants also retained their rights to appeal both the determination of liability and the dismissal of the counterclaim in an appeal from final judgment on the merits.[35] Therefore, the supreme court held the order of dismissal was not appealable and the appeal was dismissed.[36]

CONTRACTS

Hastings Pork v. Johanneson

In *Hastings Pork v. Johanneson*[37] the supreme court affirmed a summary judgment enforcing the terms of a settlement agreement.[38] The settlement agreement required that Johanneson and Olson transfer to Hastings certain mineral interests having an aggregate fair market value of $200,000 in return for dismissal of a lawsuit commenced by Hastings.[39] The agreement provided that if the appraised value of the minerals submitted was less than $200,000, then, within fifteen days, Johanneson and Olson would provide a listing of additional mineral interests that would bring the value up to $200,000.[40] The agreement further provided that if Johanneson and Olson failed to comply with the terms of the agreement, Hastings would be entitled to $157,812.50 plus interest, the amount of damages claimed in the initial complaint.[41] The district court determined that Johanneson and Olson had breached the agreement by failing to provide Hastings with a listing of additional mineral interests of sufficient value within fifteen days of notification that the appraised value of the interests initially submitted was less than $200,000.[42] The district court concluded that

33. *Id.* at 437-38. *See* N.D.R. Civ. P. 54 (b) (final judgment when more than one claim is presented).
34. 333 N.W.2d at 438-39.
35. *Id.* at 439.
36. *Id.*
37. 335 N.W.2d 802 (N.D. 1983).
38. Hastings Pork v. Johanneson, 335 N.W.2d 802, 803 (N.D. 1983).
39. *Id.* at 804.
40. *Id.*
41. *Id.* at 804 & n. 3.
42. *Id.* at 804. The first listing of mineral interests submitted by Johanneson and Olson was

no genuine issues of material fact existed and entered summary judgment for Hastings.[43]

On appeal Johanneson and Olson argued that summary judgment was inappropriate because the agreement was ambiguous.[44] Johanneson and Olson contended the agreement did not specify what was to happen if the second listing did not bring the market value of the mineral interests up to $200,000.[45] They further contended that it is reasonable to infer that they would be permitted to submit additional interests to Hastings if done in good faith and within a reasonable time.[46]

The supreme court agreed with the district court's interpretation of the agreement.[47] The court, in essence, read the settlement agreement to mean that Johanneson and Olson had only two opportunities to submit mineral interests for evalution.[48] The court noted that, according to section 9-07-04 of the North Dakota Century Code, if a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible.[49] The supreme court agreed with the district court's conclusion that Johanneson and Olson were in breach when they failed to tender mineral interests valued at $200,000 according to the terms of the settlement agreement.[50]

In his dissent Justice VandeWalle stated that, as applied in *Hastings,* the settlement agreement was ambiguous.[51] The ambiguity involved the nominal valuation that the appraiser gave to the Canadian mineral interests because of potential problems with Canadian acreage.[52] Justice VandeWalle recognized that the agreement must be interpreted to mean the appraiser could attempt to place a fair market value on the Canadian interests despite any potential problems.[53] He said that the decision of the district court should be reversed and the case remanded for an evidentiary hearing to determine the intent of the parties concerning the

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appraised at $23,865. *Id.* The additional listing, submitted pursuant to the agreement, was appraised at $20,000. *Id.* Hastings rejected further attempts by Johanneson and Olson to tender additional interests. *Id.*

43. *Id. See* N.D.R. CIV. P. 56(c) (motion and proceedings for summary judgment).

44. 335 N.W.2d at 805.

45. *Id.*

46. *Id.*

47. *Id.* at 806.

48. *Id.*

49. *Id. See* N.D. CENT. CODE § 9-07-04 (1975).

50. 335 N.W.2d at 806.

51. *Id.* (Vande Walle, J., dissenting).

52. *Id.* The appraiser stated that the potential problems involved lack of control, taxes, trustee's fees, and uncertain marketability. *Id.*

53. *Id.* at 806-07.

valuation of the Canadian mineral interests at the time they entered into the agreement.[54]

Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co.

In *Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co.*[55] the trial court ruled that Nastrom-Peterson-Neubauer Co. (NPN) was liable to Ned Nastrom Motors, Inc. (NNM) under the terms of seven lease agreements and that Donald Peterson personally guaranteed NPN's indebtedness under such agreements.[56] On appeal Peterson raised two issues: whether NPN had an obligation to pay NNM under the specific financial transactions in question and whether Peterson personally guaranteed NPN's indebtedness to NNM.[57]

The facts showed that NNM and NPN entered into approximately seventy lease agreements in which NNM was the lessor and NPN the lessee.[58] Of particular importance were seven lease agreements under which NPN purchased the items covered by the leases but gave NNM invoices showing that Ned Nastrom Motors was the lessor.[59] NNM assigned the leases to a bank and paid NPN for the items with the proceeds.[60] The end result of this financial arrangement was that NNM was under an obligation to pay the bank and NPN was to pay NNM the same amount.[61]

Peterson contended that the monies advanced to NPN constituted capital contributions and that NNM was not a secured creditor.[62] Peterson also contended that the trial court's determination of the amount of damages therefore was in error.[63] The court held that the monies advanced were not capital contributions because NPN submitted payments to NNM on the seven leases, that the transactions were reflected in NPN's books as liabilities, and that four of the seven leases were executed as written

54. *Id.* at 807.
55. 338 N.W.2d 64 (N.D. 1983).
56. Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co., 338 N.W.2d 64, 65 (N.D. 1983). Donald Peterson, the controlling shareholder in Nastrom-Peterson-Neubauer (NPN), brought this appeal. *Id.* at 65.
57. *Id.* at 65. The court divided its opinion into two sections: NPN's obligation to Ned Nastrom Motors (NNM) and Donald Peterson's personal guarantee of NPN's obligation to NNM. *Id.* at 65, 68.
58. *Id.* at 66. Peterson and Nastrom exchanged stock in the two companies resulting in Nastrom being the sole owner of NNM and Peterson becoming the controlling shareholder in NPN. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 67.
63. *Id.*

leases thereby implying that all seven were intended by the parties to be leases.[64] The supreme court held that the trial court's damage award was not clearly erroneous because the damages could be mathematically calculated.[65]

The supreme court then discussed Peterson's personal guarantee of NPN's obligation to NNM.[66] The facts showed that when NPN bought equipment, the party financing the purchase was usually entitled to receive all or a portion of the proceeds NPN received from the sale of the equipment.[67] Peterson had personally guaranteed a large number of NPN's debts.[68] After a manufacturer attached NPN's assets pending foreclosure, Peterson negotiated to sell NPN's assets so Peterson could be absolved of all personal liability.[69] Subsequently, Peterson told Nastrom that Nastrom would be "taken care of" personally by him or out of the company's funds.[70]

Peterson contended that his statements to Nastrom were not a personal guarantee or, in the alternative, unenforceable because the statements were not in writing.[71] The court held that the trier of fact was to determine whether the statement was a personal guarantee.[72] Since the facts showed that it was possible that Peterson did personally guarantee the obligations, the court held that Peterson personally guaranteed NPN's obligations.[73] The court also held that when the leading objective of the promisor is to subserve some interest or purpose of his own, his promise need not be in writing to be enforceable.[74] The court found that Peterson's

64. *Id.* The court found that, because the transactions were entered on the books of NPN as liabilities, the parties involved could not have intended that the monies were injections of capital. *Id.* The court also found that even though the parties did not execute written leases on three of the transactions, they were structured in the same way as the other four leases. *Id.*

65. *Id.* at 68. Peterson stated that unrebutted accounting testimony showed that the damages due were $24,622.23. *Id.* The accountant did state that this figure merely represented four of the seven leases and did not include the three leases to construction companies. *Id.* The court found that, by including these three leases, the trial court could have found $163,793.21 was owed NNM. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 68, 69.

69. *Id.* at 69. Clark Equipment, a manufacturer, had a blanket security interest on virtually all of NPN's machinery and other property. *Id.* at 68. Consequently, Peterson attempted to sell the assets of NPN to generate enough capital to pay NPN's creditors. *Id.* at 69. Subsequent to the sale, NPN did satisfy all creditors except NNM. *Id.*

70. *Id.* at 69.

71. *Id.* at 69-70.

72. *Id.* at 69 (citing Nelson v. TMH, Inc., 292 N.W.2d 580, 583 (N.D. 1980); State Bank v. Rauh, 288 N.W.2d 299, 305 (N.D. 1980)).

73. *Id.* at 70. Nastrom and Peterson were involved in numerous business ventures in the past. *Id.* Based on these prior dealings, Nastrom believed that Peterson's "word was better than most men's checks." *Id.* The court found that, given the relationship between the two men, Peterson must have known that Nastrom would interpret his statements as a personal guaranty. *Id.*

74. *Id.* at 71. The North Dakota Century Code provides, "Except when a guarantee is deemed an original obligation as provided in section 22-01-05, a guaranty must be in writing and signed by the guarantor, but the writing need not express consideration." N.D. CENT. CODE § 22-

oral guarantee was to further the sale of the assets and that Nastrom relied on Peterson's promise in refraining from bringing any legal action. Peterson was, therefore, personally liable for any debt owed to NNM from NPN.[75]

Yon v. Great Western Development Corp.

In June of 1981 Great Western Development Corporation entered into a contract for deed to purchase a parcel of real estate from the Yons.[76] The contract contained a standard acceleration clause allowing the Yons to cancel the contract upon default by Great Western.[77] Great Western entered into a contract for deed, with an essentially identical acceleration clause, to sell the property to RF Investment.[78] Subsequently, Great Western failed to pay an annual installment and the Yons began a foreclosure action.[79] Great Western cross-claimed against RF Investment alleging default on its contract for deed.[80]

Language in the preliminary drafts of the contracts for deed providing for specific performance on default were deleted from the final drafts of the contracts.[81] Great Western and RF Investment asserted, therefore, that specific performance should not be an available remedy to the Yons.[82] They further asserted that foreclosure is so similar to specific performance that the trial court should allow it, and that Yon's sole remedy should be termination of the contract and repossession of the property.[83] The trial court granted Yon's motion for summary judgment.[84] The court concluded that Yon's agreement not to exercise specific performance did not preclude them from exercising the remedy of foreclosure.[85]

The supreme court affirmed the trial court's decision.[86] The court noted initially that the language of the contract's default

01-04 (1982). The court found that Peterson's guarantee was an original obligation and, therefore, did not have to be in writing. 338 N.W.2d at 71.

75. 338 N.W.2d at 71.

76. Yon v. Great Western Dev. Corp., 340 N.W.2d 43, 44 (N.D. 1983).

77. *Id.*

78. *Id.* at 45.

79. *Id.*

80. *Id.* The trial court noted that technically, Great Western could not enter into a contract for deed with RF Investment since it did not hold title to the property. The trial court concluded, nevertheless, that Great Western's right to foreclose was clear and, therefore, deemed the cross-claim sufficient. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 47.

provision was unambiguous.[87] Therefore, the trial court improperly admitted extrinsic evidence pertaining to the specific performance language contained in the preliminary drafts of the contracts.[88] The court further concluded that silence in the default provision with respect to remedies other than termination does not render the contract ambiguous and does not limit the remedies available to the seller.[89]

In dicta the court stated that even if the Yons had agreed not to exercise the remedy of specific performance they would not have been precluded from exercising the remedy of foreclosure.[90] The court reasoned that, unlike foreclosure, specific performance is available only when the legal remedy of damages is inadequate.[91] Further, under specific performance the relief requested is the entire balance of the contract. In a foreclosure action the remedy is the balance owing under the contract unless a jury, in a separate deficiency proceeding, determines a deficiency exists.[92]

CRIMINAL LAW AND PROCEDURE

Dickinson Newspapers, Inc. v. Jorgensen

In *Dickinson Newspapers, Inc. v. Jorgensen*[93] Dickinson Newspapers, Inc. and other news media challenged an order of the county court that a preliminary hearing be closed to the press.[94] The news media argued that the preliminary hearing was required by the North Dakota[95] and United States Constitutions[96] to be open to the public and the press, except in limited circumstances; and that by closing the preliminary hearing without giving adequate reasons, the county court abused its discretion.[97] The supreme court stated that the right of access to judicial proceedings was limited by the constitutional right to a fair trial.[98] The court, therefore, ruled that the county court judge did not abuse his

87. *Id.* at 46.
88. *Id.* at 45-46. The court stated that extrinsic evidence should be considered only when the language of the agreement is ambiguous and such a determination is a question of law. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 47.
93. 338 N.W.2d 72 (N.D. 1983).
94. Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 74 (N.D. 1983).
95. *See* N.D. CONST. art. I, §§ 9, 12.
96. *See* U.S. CONST. amend. VI.
97. 338 N.W.2d at 74-75.
98. *Id.* at 76.

discretion in ordering that the preliminary hearing be closed to the press.[99]

Judge Jorgensen issued an order closing the preliminary examination of John J. Huber[100] after Huber, with the concurrence of the state's attorney, requested the closing order.[101] Petitioners were not parties in the preliminary examination proceedings, but were allowed to intervene because their request was a matter of vital concern to the public.[102] The supreme court, however, indicated that the failure to include the real party in interest as a party respondent may be justification for denying standing to sue.[103]

North Dakota allows a discretionary closing of the preliminary examination.[104] The court noted that a preliminary hearing differs from a trial or pretrial proceeding in that the prosecution's evidence may include hearsay and other prejudicial testimony, including evidence obtained by illegal means.[105] Such prejudicial testimony, if made public before trial, may violate the accused's constitutional right to a fair trial.[106] The court found that the sixth amendment to the federal constitution and the North Dakota constitutional provisions providing that all courts shall be open do not apply with the same force and effect to preliminary hearings as they apply to trials.[107] Further, the court noted that the constitutional right to a public trial is primarily for the benefit of the defendant.[108] Thus, the defendant's constitutional right to a fair trial could not be overshadowed by the rights of the public, including the news media.[109]

The court determined that the press had no constitutional right of access to a preliminary hearing.[110] The press does not occupy a special status distinct from the general public.[111] The news media, therefore, could properly be denied access to preliminary examinations.[112] The court emphasized that the closure of a preliminary hearing does not make it secret[113] and that

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99. *Id.* at 81.
100. *Id.* at 74. Huber was charged with four counts of murder and one count of attempted murder. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* In *Dickinson Newspapers* the party in interest was Huber. *Id.*
104. *Id.* at 76. *See* N.D. CENT. CODE § 29-07-14 (1983); N.D.R. CRIM. P. 5, 51 (1981).
105. 338 N.W.2d at 75.
106. *Id.*
107. *Id.*
108. *Id.* at 79.
109. *Id.* at 80.
110. *Id.* at 77.
111. *Id.* at 79.
112. N.D. CENT. CODE § 29-07-14 (1983).
113. 338 N.W.2d at 76, 78.

the record will usually be available to the public after the case has been dismissed or a jury has been selected for trial.[114]

The supreme court found that the remedies available to Huber other than the closure of his preliminary hearing were correctly examined and rejected by Judge Jorgensen.[115] The court determined that Judge Jorgensen did not act in an arbitrary, unreasonable, or unconscionable manner.[116] Therefore, the court held that the closure order issued by Judge Jorgensen was proper.[117] Petitioner's stay of the preliminary hearing was vacated and their petition for a supervisory writ was denied.[118]

In a special concurring opinion, Justice Pederson wrote that *Dickinson Newspapers* overruled *KFGO Radio, Inc. v. Rothe*[119] to the extent that *KFGO* held that the North Dakota Constitution[120] required all proceedings in court to be open.[121]

State v. Dilger

In *State v. Dilger*[122] Dilger appealed from a judgment entered upon a jury verdict finding him guilty of murder.[123] Dilger murdered the woman with whom he had been living, after she embarrassed him at a local bar.[124] After murdering her, he returned to the bar and told patrons that he just killed the woman.[125]

Dilger moved to suppress all the statements he made to law enforcement officers on the ground that he had not been adequately advised of his *Miranda*[126] rights and that, even if adequately informed of his rights, the statements were not voluntarily made.[127] The supreme court affirmed the trial court's denial of defendant's motion holding that when the evidence of voluntariness of a confession is conflicting the supreme court will not disturb the trial court's holding unless it is "manifestly against the weight of the evidence."[128] Utilizing a totality of the circumstances

114. *Id.* at 76.
115. *Id.* at 79-80.
116. *Id.* at 80.
117. *Id.* at 81.
118. *Id.*
119. 298 N.W.2d 505 (N.D. 1980).
120. N.D. CONST. art. I, § 9.
121. 338 N.W.2d at 81 (Pederson, J., concurring).
122. 338 N.W.2d 87 (N.D. 1983).
123. State v. Dilger, 338 N.W.2d 87, 88 (N.D. 1983).
124. *Id.*
125. *Id.*
126. Miranda v. Arizona, 384 U.S. 436 (1966).
127. 338 N.W.2d at 89.
128. *Id.* The court relied on its previous holdings in State v. Thompson, 256 N.W.2d 706, 710 (N.D. 1977) and State v. Nagel, 75 N.D. 495, 28 N.W.2d 665, 677 (1947).

approach, the supreme court noted that the police read Dilger his rights a number of times and that each time he indicated that he understood them and that no evidence of wrongdoing existed.[129]

The court also considered Dilger's contention that the ten month delay between his arraignment and trial deprived him of his right to a speedy trial.[130] The court stated that four factors were relevant in determining whether a delay violated the right to a speedy trial: the length of the delay; the reason for the delay; the defendant's assertion of his right; and the prejudice that the delay caused the defendant.[131] The court noted that the delay in this case occurred in part because the State filed an interlocutory appeal from the order suppressing photographs of the murder scene, which appeals are ordinarily not considered in speedy trial claims.[132] In addition, the court found that Dilger neither asserted his right to a speedy trial nor had he shown any prejudice resulting from the delay.[133] The court also found that, because extreme emotional disturbance was not a statutorily designated defense to murder, the State need not prove its nonexistence in order for the jury to return a murder conviction.[134] The court indicated that the trial court instructed the jury that the State must prove each element of murder beyond a reasonable doubt and that the jury should consider extreme emotional disturbance and reasonable justification.[135] Since the instruction was a proper statement of the law, the supreme court found that no cognizable claim of error existed.[136]

State v. Eugene

In *State v. Eugene*[137] Eugene appealed from a jury verdict finding him guilty of burglary.[138] Police took certain items of evidence into custody, which were lost before trial.[139] The police offered no explanation for the loss.[140]

The supreme court held that under the circumstances of this

129. 338 N.W.2d at 90.
130. *Id.*
131. *Id.* The court relied on Barker v. Wingo, 407 U.S. 514 (1972) and State v. Erickson, 241 N.W.2d 854 (N.D. 1976) in formulating this test.
132. 338 N.W.2d at 91-92.
133. *Id.* at 92.
134. *Id.* at 95.
135. *Id.* at 95-96.
136. *Id.* at 96.
137. 340 N.W.2d 18 (N.D. 1983).
138. State v. Eugene, 340 N.W.2d 18, 22 (N.D. 1983).
139. *Id.* at 23.
140. *Id.*

case the loss of the physical evidence did not impinge on Eugene's due process right to a fair trial.[141] The court stated that the application of the rule of *Brady v. United States*[142] extended to cases in which the requested evidence was lost or discarded by the State.[143] The supreme court held, however, that the State's duty to preserve evidence arises only after the State knows, or has reason to know, that the evidence is, or is claimed to be, material and exculpatory.[144]

The supreme court noted that evidence of previous convictions, even if not automatically admissible under Rule 609 (a)(2) of the North Dakota Rules of Evidence, may still be admissible under Rule 609 (a) (1) if the trial court determines "that the probative value of the evidence outweighs its prejudicial effect to the defendant."[145] The supreme court stated that it could not say, as a matter of law, that the trial court failed to meaningfully exercise the discretion given it by Rule 609 (a) (1).[146]

The supreme court found no merit in Eugene's contention that the trial court erred in granting him only one day credit for time served prior to his sentencing in this case.[147] The court revoked Eugene's suspended sentence for a previous conviction following his arrest in connection with the burglary at the restaurant.[148] The court held that credit for time served in connection with unrelated charges based on conduct other than that for which the defendant is ultimately sentenced is inappropriate.[149]

State v. Freed

In *State v. Freed*[150] the State appealed from an order suppressing

141. *Id.* at 28.

142. 373 U.S. 83 (1963). The *Brady* rule provides that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. United States, 373 U.S. 83, 87 (1963).

143. 340 N.W.2d at 26. The North Dakota Supreme Court first extended the *Brady* rule to cases in which requested evidence was lost or discarded by the State in State v. Larson, 313 N.W.2d 750, 753-54 (N.D. 1981).

144. 340 N.W.2d at 27. In *Eugene* there was no indication that the State had reason to know Eugene believed the lost items of evidence were exculpatory. *Id.*

145. *Id.* at 33. Rule 609 (a) of the North Dakota Rules of Evidence provides as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

N.D.R. EVID. 609(a).

146. 340 N.W.2d at 33.

147. *Id.*

148. *Id.*

149. *Id.*

150. 340 N.W.2d 172 (N.D. 1983).

the results of chemical tests of a blood sample taken from Freed following an automobile accident.[151] Freed moved to dismiss the appeal on the ground that the prosecuting attorney failed to comply with section 29-28-07 (5) of the North Dakota Century Code, which requires an attorney to file a statement with a notice of appeal.[152] The State requested leave to file the required statement.[153] Freed argued that the requirement that an attorney file a statement with a notice of appeal is a jurisdictional requirement and, thus, compliance should not be waived.[154] The supreme court declined to rule that the requirement was jurisdictional,[155] but stated that the court could impose sanctions, including dismissal, for failure to comply with the statute.[156]

The State contended that its appeal should not be dismissed because of the preferred policy of deciding an appeal on its merits.[157] The State also argued that in previous cases the supreme court had not dismissed appeals for failure to file statements in compliance with section 29-28-07 (5) of the North Dakota Century Code.[158] The supreme court acknowledged that in the past it had not dismissed appeals for failure to file the required statements, but noted that in each case it expressed its disapproval and issued a warning that the requirement should not be ignored.[159] The supreme court stated that since the requirement had been in effect for more than five years and the court had repeatedly admonished state's attorneys in the past for noncompliance, it could no longer permit the rule to be disregarded.[160] The court, therefore, dismissed the appeal.[161]

State v. Halvorson

In *State v. Halvorson*[162] Halvorson appealed from judgments

151. State v. Freed, 340 N.W.2d 172, 173 (N.D. 1983). Freed moved to suppress the results of the blood test on the grounds that the blood sample was taken without his consent or a search warrant, and that the sheriff had not informed him that he was under arrest while he was in the emergency room. *Id.* at 174.

152. *Id.* at 173. *See* N.D. CENT. CODE § 29-28-07(5) (Supp. 1983).

153. 340 N.W.2d at 174. The State contended that case law supported the view that mere failure to file a statement does not warrant dismissal of an appeal, particularly when the content of the statement has not been challenged. *Id.*

154. *Id.*

155. *Id. See* N.D.R. CRIM. P. 37(c); N.D.R. APP. P. 3(c).

156. 340 N.W.2d at 174.

157. *Id.* at 175.

158. *Id.*

159. *Id.*

160. *Id.* at 176.

161. *Id.* The dissent urged that a less harsh sanction than dismissal of the State's appeal, such as comprehensive training sessions for state's attorneys, would be less disruptive of the judicial system and would support the public's interest in the prosecution of criminal cases. *Id.* (Erickstad, C. J., dissenting).

162. 340 N.W.2d 176 (N.D. 1983).

convicting him of operating a motor vehicle while under the influence of intoxicating liquor[163] and escape.[164] Halvorson raised three issues on appeal: whether he was under the influence of alcohol to an extent that impaired his ability to operate a motor vehicle,[165] whether the trial court erred in denying his motion for judgment of acquittal,[166] and whether clear and convincing evidence sustained his convictions.[167]

The supreme court stated that Halvorson misapprehended the nature of the DWI charge.[168] The court noted that objective and direct evidence of impairment of a defendant's driving ability because of intoxication was not required.[169] The court stated that the prosecution must prove only two elements to sustain a DWI charge: that the defendant was driving a motor vehicle on a public way and that he was under the influence of intoxicating liquor to an extent that he did not possess clearness of intellect and control of himself.[170]

The court indicated that a motion for judgment of acquittal can be granted only if the evidence is insufficient to sustain a conviction for the offense.[171] Furthermore, the court stated that its review is not based upon the clear and convincing evidence standard.[172] Rather, the court, viewing the evidence in a light most favorable to the verdict, determined whether there was substantial evidence to support the conviction.[173] Thus, the court held that the trial court did not err in denying Halvorson's motion for judgment of acquittal[174] and that there was substantial evidence to support Halvorson's convictions.[175]

State v. Hilsman

In *State v. Hilsman*[176] Hilsman appealed his conviction of two counts of robbery.[177] Hilsman alleged that the trial court erred by

163. State v. Halvorson, 340 N.W.2d 176, 177 (N.D. 1983). *See* N.D. CENT. CODE § 39-08-01 (Supp. 1983).
164. 340 N.W.2d at 177. *See* N.D. CENT. CODE § 12.1-08-06 (1976).
165. 340 N.W.2d at 177.
166. *Id.* at 178. *See* N.D.R. CRIM. P. 29(a) (1983).
167. 340 N.W.2d at 178.
168. *Id.* at 177-78.
169. *Id.* at 178 (citing State v. Salhus, 220 N.W.2d 852, 856 (N.D. 1974)).
170. 340 N.W.2d at 178 (citing *Salhus,* 220 N.W.2d at 856.).
171. 340 N.W.2d at 178.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. 333 N.W.2d 411 (N.D. 1983).
177. State v. Hilsman, 333 N.W.2d 411, 411 (N.D. 1983). Hilsman was convicted of two counts of robbery, which included the theft of $191.00 from the Econ-O-Inn on November 30, 1981 and $300.00 from the General Store on December 14, 1981. *Id.* at 414.

restricting the defense counsel's cross-examination of the State's chief witness to test the witness's credibility,[178] and by precluding the defense counsel from attempting to impeach the credibility of an individual who did not testify at Hilsman's trial.[179]

With respect to the cross-examination issue, the supreme court noted that, under Rule 608(b) of the North Dakota Rules of Evidence, a trial court has the discretion to allow a party to impeach a witness with regard to certain conduct that did not result in a conviction if that conduct was probative of a witness's character for truthfulness or untruthfulness.[180] The court found that whether the witness was accused of theft was not probative of his veracity or honesty, and further that mere accusations of a crime could not be used to impeach the credibility of a witness.[181] The court held, therefore, that the trial court committed no error by limiting the scope of cross-examination.[182]

The supreme court next considered the defendant's second allegation that the trial court erred by precluding defense counsel from attempting to impeach the credibility of an individual who was not a witness for either the State or the defense.[183] The defendant again contended that Rule 608(b) of the North Dakota

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178. *Id.* at 412.

179. *Id.* Hilsman raised two minor issues. First, Hilsman alleged that the State's reference to a polygraph examination in its closing argument constituted reversible error. *Id.* at 413. A trial court has discretionary control over the scope of counsel's opening and closing arguments. *Id.* The supreme court will not overturn a trial court on the basis that counsel's arguments were excessive unless a clear abuse of discretion is shown. *Id.* The court noted that when the prosecutor mentioned "polygraph" in his closing argument, he was referring to the jury instructions. *Id.* The court found that this did not exceed the permissible scope of his closing argument. *Id.*

Second, Hilsman contended that the State's evidence against him was entirely circumstantial and did not sustain the jury verdict of guilty beyond a reasonable doubt. *Id.* At the trial court circumstantial evidence must be conclusive and must exclude every reasonable hypothesis of innocence. *Id.* at 414. The role of the appellate court, however, is "merely to review the record to determine if there was competent evidence that allows the jury to draw an inference reasonably tending to prove guilt, and fairly warranting a conviction." *Id.* The supreme court, upon reviewing the record, found that the jury could have reasonably concluded that Hilsman was guilty beyond a reasonable doubt. *Id.*

180. *Id.* at 414. *See* N.D.R. EVID. 608(b). Rule 608(b) provides:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Id.

181. 333 N.W.2d at 412. Aaron Stein was the principal witness for the state. *Id.* The court noted that without his testimony a conviction would not have been likely. *Id.* The defense counsel was prevented from destroying his credibility by cross-examining him with regard to his being accused of stealing a shotgun. *Id.*

182. *Id.*

183. *Id.* at 412-13. Brian Stein and Aaron Stein were brothers. *Id.* at 412 n.1. They lived with Hilsman from the end of July until the 19th or 20th of November 1981. *Id.*

Rules of Evidence allowed him to attack a witness's credibility through cross-examination with regard to specific instances of conduct.[184] The court, however, found that defense counsel unlawfully attempted to impeach, through the use of extrinsic evidence, the credibility of an individual who was not a witness for either the State or the defense.[185] Subsequently, the supreme court held that the trial court committed no error.[186]

State v. Klose

In *State v. Klose*[187] the State appealed from an order dismissing a DUI charge against Klose.[188] The State raised two issues on appeal: whether the county court had the legal authority to amend the initial complaint on a motion by Klose[189] and whether the double jeopardy provisions of the United States and North Dakota Constitutions applied to the county court's acceptance of Klose's guilty plea to the reduced charge.[190]

The supreme court stated that the county court did not have the authority to amend the complaint to charge a lesser offense without the consent or request of the prosecution.[191] The supreme court concluded that since Klose initiated and pursued the action precipitating the error by the court, of which Klose now complains, he could not use it to his advantage by claiming that the double jeopardy provisions applied.[192] Therefore, the court reversed the order dismissing the DUI charge and remanded the case.[193]

State v. Leidholm

In *State v. Leidholm*[194] Janice Leidholm was charged with

184. *Id.* at 412-13.

185. *Id.* at 413. Hilsman contended that the trial court erroneously prohibited him from subpoenaing the sheriff of Williams County who allegedly would have testified that Brian Stein had committed a theft and, as a result, was fired as a deputy sheriff. *Id.* at 412-13.

186. *Id.* at 413.

187. 334 N.W.2d 647 (N.D. 1983).

188. State v. Klose, 334 N.W.2d 647, 648 (N.D. 1983). Klose moved to amend the complaint to reduce the charge to actual physical control. *Id.* The motion was granted and Klose pleaded guilty. *Id.* The state then filed a motion to vacate the judgment. *Id.* The motion was granted and the case was set for trial on the original charge. *Id.* Klose again moved to amend the complaint. *Id.* The district court concluded that the county court originally acted without authority in amending the initial complaint, but found that Klose had been placed in jeopardy because the county court accepted his guilty plea, and therefore the district court dismissed the charge. *Id.*

189. *Id.* at 648-49. See N.D.R. CRIM. P. 3(b), 7(e) (amendment of complaint).

190. 334 N.W.2d at 650. *See* U.S. CONST. amend. V; N.D. CONST. art. I, § 12 (double jeopardy).

191. 334 N.W.2d at 649.

192. *Id.* at 652.

193. *Id.*

194. 334 N.W.2d 811 (N.D. 1983).

murder for the stabbing death of her husband, Chester Leidholm. According to testimony, the Leidholm marriage was filled with a mixture of alcohol abuse, moments of kindness, and moments of violence.[195] At trial the defense offered jury instructions on self-defense based on the theory of battered women syndrome.[196] The trial court refused to include the proposed instructions; rather, it utilized the reasonable and prudent person standard and found Janice Leidholm guilty of manslaughter.[197] Leidholm appealed alleging several errors.[198] The controlling issue was whether the trial court correctly instructed the jury on self-defense.[199]

The supreme court first explained the basic operation of the law of self-defense in North Dakota.[200] The court noted that the North Dakota Century Code failed to state whether North Dakota adheres to the objective or subjective standard of reasonableness.[201] The court found guidance on this issue from past decisions, noting that in 1907 the North Dakota Supreme Court unanimously decided to accept the subjective standard because the court believed it to be a more just standard than the objective standard.[202] As late as 1974, the court confirmed that early decision.[203] Thus, the factfinder must view the circumstances attending an accused's use of force from the standpoint of the accused to determine whether the circumstances were sufficient to create an honest and reasonable belief in the accused's mind that the use of force was necessary to protect herself from imminent harm.[204]

The trial court, in its statement of the law of self-defense, used the reasonable and prudent person standard.[205] The supreme court, therefore, concluded that the trial court's instruction was a misstatement of the law of self-defense.[206] A correct statement of the law would view the circumstances from the standpoint of the defendant alone rather than from the standpoint of a reasonable and prudent person.[207] The court further found that nothing in the proposed jury instructions, based on the theory of battered women syndrome, would add to or significantly alter a correct instruction

195. State v. Leidholm, 334 N.W.2d 811, 813 (N.D. 1983).
196. *Id.* at 819.
197. *Id.* at 818, 819.
198. *Id.* at 814.
199. *Id.*
200. *Id. See* N.D. CENT. CODE § 12.1-05-03 (1976).
201. 334 N.W.2d at 817.
202. *Id.* (citing State v. Hazlett, 16 N.D. 426, 113 N.W.374 (1907)).
203. 334 N.W.2d at 817. *See* State v. Jacob, 222 N.W.2d 586 (N.D. 1974).
204. 334 N.W.2d at 817-18.
205. *Id.* at 818.
206. *Id.*
207. *Id.*

on the law of self-defense.[208] Thus, it concluded that the trial court need not include a specific instruction on battered women syndrome in its charge to the jury when the instruction was modeled after North Dakota's present law of self-defense.[209]

State v. Metzner

In *State v. Metzner*[210] the State appealed from the district court's order granting the defendant's motion to suppress evidence.[211] In *Metzner* a federal agent and other law enforcement agents made a warranted arrest of the defendant, a convicted felon, for a violation of the federal firearms law.[212] Concomitant with the arrest, the officers made a warranted entry into the defendant's house and a search pursuant to that warrant revealed three firearms, including the rifle described in the search warrant, and marijuana.[213] The district court suppressed the evidence based on its determination that probable cause did not exist to believe that the rifle sought in the federal agent's affidavit would be found in the defendant's home.[214] The North Dakota Supreme Court held that the motion to suppress should not have been granted because the magistrate performed his function in determining whether there was probable cause in a nonarbitrary manner.[215]

The supreme court relied on the holding in *United States v. Green,*[216] which stated that a nexus must exist between the house to be searched and the evidence sought.[217] The affidavit must contain facts and circumstances that would warrant a reasonable man to believe that the articles sought were located at the place to be searched.[218] Notwithstanding the recognition that determinations of probable cause often fall into a gray area in which reasonable persons might justifiably come to different conclusions, the court in *Metzner* chose to resolve the doubt in favor of sustaining the

208. *Id.* at 820.
209. *Id.*
210. 338 N.W.2d 799 (N.D. 1983).
211. State v. Metzner, 338 N.W.2d 799, 800 (N.D. 1983).
212. *Id.* at 802-03.
213. *Id.* at 803.
214. *Id.* at 804. The district court stated that there were no facts which indicated that the rifle had been removed from the defendant's vehicle and brought into his home other than the magistrate's opinion in his affidavit that "people usually do." *Id.*
215. *Id.* at 804-05. *See* Bastida v. Henderson, 487 F.2d 860, 863 (5th Cir. 1973). The court in *Bastida* stated that a magistrate's judgment concerning whether facts alleged in an affidavit constitute probable cause for issuance of a warrant is conclusive in absense of arbitrariness. *Id.*
216. 634 F.2d 222 (5th Cir. 1981).
217. 338 N.W.2d at 804 (citing United States v. Green, 634 F.2d 222 (5th Cir. 1981)).
218. 338 N.W.2d at 804-05. *See* United States v. Maestas, 546 F.2d 1177, 1180 (5th Cir. 1977). The court in *Maestas* stated that evidence that a defendant had stolen material, which one would normally expect him to hide at his residence, would support a search of his residence. *Id.* at 1180.

magistrate's judgment and search.[219] Accordingly, the court held that the evidence should not have been suppressed because a magistrate could logically have concluded that the information contained in the affidavit satisfied the test of probable cause and warranted a legitimate search within the scope of the fourth amendment.[220]

State v. Morris

In *State v. Morris*[221] the appellants, Gail John Wanner and Clayton Virgil Morris, were charged with possession of a controlled substance with intent to deliver in violation of section 19-03.1-23 (1) of the North Dakota Century Code.[222] The trial court found Wanner guilty of possession of marijuana with intent to deliver and Morris guilty of possession of less than one-half ounce of marijuana.[223] The North Dakota Supreme Court affirmed the convictions.[224]

The appellants first contended that the trial court erred in allowing the arresting officers to give expert testimony pursuant to Rule 702 of the North Dakota Rules of Evidence.[225] The court, however, expressed the opinion that Rule 702 should be given an expansive interpretation.[226] The court stated that "an experienced, well-trained, and knowledgeable law officer may give his opinion that a certain quantity of marijuana would normally be possessed for purposes of sale rather than for personal use."[227]

Next, the appellants challenged the sufficiency of the evidence used to convict them. The court reaffirmed its holding in *State v. Rippley*[228] and held that "constructive possession" of the controlled substance was sufficient to fulfill the requirements of the statute.[229]

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219. 338 N.W.2d at 805. The court stated that there was no "bright line" test by which to judge the sufficiency of an affidavit. *Id.*

220. *Id.*

221. 331 N.W.2d 48 (N.D. 1983).

222. State v. Morris, 331 N.W.2d 48, 51 (N.D. 1983). *See* N.D. CENT. CODE § 19-03.1-23(1) (Supp. 1983). Section 19-03.1-23(1) provides in part, "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."
Id.

223. 331 N.W.2d at 51.

224. *Id.*

225. *Id.* at 53. *See* N.D.R. EVID. 702. Rule 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

226. 331 N.W.2d at 53.

227. *Id.*

228. 319 N.W.2d 129 (N.D. 1982).

229. 331 N.W.2d at 53. The court stated that the State did not have to show either that the accused had knowledge of the drug's presence, or that the accused had knowledge of the substance's

In addition the court stated that "constructive possession or the ability to exercise dominion and control over a controlled substance, can be inferred from the totality of circumstances associated with a particular case."[230] In determining whether constructive possession exists, the court enumerated several factors that trial courts may consider. These include (1) "an accused's presence in the place where a controlled substance is found," (2) "his proximity to the place where it is found," and (3) "the fact that the controlled substance is found in plain view."[231]

Morris also argued that section 19-03.1-23(3)[232] was constitutionally infirm because it violated the due process and equal protection clauses of the United States and North Dakota Constitutions[233] by creating "a strict liability offense which may result in the conviction of a person without knowledge of his possession of a controlled substance, and therefore without any conscious or calculated wrong doing."[234] The court, however, would not entertain this issue because Morris could not show that the statute was unconstitutional as it was applied to him.[235] The court noted that there were numerous other factors that pointed toward his guilt and that he had knowledge of the presence of the controlled substance in the van, thus negating his contention that he had been convicted on the basis "of his innocent act of being present in a vehicle that contained a controlled substance."[236]

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identity. *Id.* at 54. "The evidence required to show an individual's power and capability to exercise control over a controlled substance need only establish his right or his ability to control, in a realistic and practical sense, the area where, or the container in which, the contraband was found." *Id.*

230. *Id.*

231. *Id.*

232. N.D. CENT. CODE § 19-03.1-23(3) (Supp. 1983). Section 19-03.1-23(3) provides:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter; provided, that any person whose conduct is in violation of section 12-46-24, 12-47-21, or 12-51-11 shall not be prosecuted under this subsection. Any person who violates this subsection is guilty of a class C felony; except that any person who violates this subsection regarding possession of one-half ounce [14.175 grams] to one ounce [28.35 grams] of marijuana, shall be guilty of a class A misdemeanor; and any person, except a person operating a motor vehicle, who violates this subsection regarding possession of less than one-half ounce [14.175 grams] of marijuana shall be guilty of a class B misdemeanor. Any person who violates this subsection regarding possession of less than one-half ounce [14.175 grams[of marijuana while operating a motor vehicle shall be guilty of a class A misdemeanor.

Id.

233. 331 N.W.2d at 58. *See* U.S. CONST. amend. XIV, § 1; N.D. CONST. art. I, § 1.

234. 331 N.W.2d at 58.

235. *Id.*

236. *Id.*

State v. Novak

In *State v. Novak*[237] the appellant was convicted for being in physical control of a motor vehicle while under the influence of alcohol. The appellant contended that his conviction was beyond the scope of the statute under which he was charged.[238] Novak was arrested after being found asleep at the wheel of his running automobile parked at the edge of a country field.[239] On appeal he claimed that section 39-08-01 of the North Dakota Century Code applied only to drivers on state highways or other public or private areas open to the public.[240]

The supreme court noted that whether the "actual physical control" statute applied to vehicles on private property was an issue of first impression.[241] The court concluded that section 39-10-01, which extended the coverage of laws relating to driving under the influence to "highways and elsewhere throughout the state,"[242] also applied to the prohibitions contained in section 39-08-01.[243] Thus the court affirmed the conviction.[244]

The supreme court rejected Novak's assertion that the specific provisions of section 39-08-01 should control the general provisions of section 39-10-01.[245] This rule of construction was proper, the court stated, only if the statutes in question were irreconcilable.[246] The court further found support for its holding in subsequent legislative amendments to section 39-10-01, clarifying the section's application to all of title 39 of the North Dakota Century Code.[247]

State v. Skjonsby

In *State v. Skjonsby*[248] Skjonsby appealed for post-conviction

237. 338 N.W.2d 637 (N.D. 1983).

238. State v. Novak, 338 N.W.2d 637, 638 (N.D. 1983). *See* N.D. CENT. CODE § 39-01-01(2)(b) (Supp. 1983). For the version of this statute in effect at the time of Novak's arrest, see 1981 N.D. Sess. Laws 1130.

239. 338 N.W.2d at 638.

240. *Id.* Section 39-08-01 then provided in part: "No person shall drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if: . . . He is under the influence of intoxicating liquor. . . ." N.D. CENT. CODE § 39-08-01(1)(b) (Supp. 1981).

241. 338 N.W.2d at 639.

242. See N.D. CENT. CODE § 39-10-01 (1980) for the statute in effect at the time of Novak's arrest.

243. 338 N.W.2d at 640. The supreme court found that any other construction would defeat the legislature's intent to protect the public from drunken drivers, wherever they might be found. *Id.*

244. *Id.*

245. *Id.* at 639. *See* N.D. CENT. CODE § 1-02-07 (1975) (if provisions conflict and effect cannot be given to both, the specific provision controls over the general).

246. 338 N.W.2d at 639.

247. *Id.* at 640 & n.2. *See* 1983 N.D. Sess. Laws 1374.

248. 338 N.W.2d 628 (N.D. 1983).

relief pursuant to chapter 29-32 of the North Dakota Century Code.[249] Skjonsby was convicted of murder and attempted murder and the supreme court had previously affirmed the convictions.[250] Skjonsby applied to the district court for the post-conviction relief and requested that the court set aside his convictions and grant a new trial.[251] The district court summarily denied Skjonsby's application without a hearing.[252] The supreme court found that the allegations made in Skjonsby's application raised significant issues of material fact,[253] and therefore held that the district court's summary disposition of Skjonsby's application was inappropriate and that Skjonsby was entitled to a full evidentiary hearing on the issues.[254]

In his application for post-conviction relief, Skjonsby alleged that he was denied effective legal assistance at his murder trial because his attorneys were involved with perjured testimony given by a witness at the trial.[255] Skjonsby also alleged that he was unable to effectively assist in his own defense because his diminished physical, mental, and emotional condition at the time of trial rendered him incapable of making rational decisions.[256] The district court denied Skjonsby's application because the judge determined that Skjonsby was fully competent at trial to assist in his

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249. State v. Skjonsby, 338 N.W.2d 628, 628 (N.D. 1983). Chapter 29-32 of the North Dakota Century Code is North Dakota's codification of the Uniform Post-Conviction Procedures Act. Section 29-32-01 provides that a proceeding to secure relief will be available for anyone who has been convicted of a crime and who claims:

> a. That the conviction or the sentence was in violation of the constitution, laws, or treaties of the United States or the constitution or laws of this state;
> b. That the court was without jurisdiction to impose sentence;
> c. That the sentence exceeds the maximum authorized by law;
> d. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> e. That his sentence has expired, that his probation, parole, or conditional release has been unlawfully revoked, or that he is otherwise unlawfully held in custody or other restraint; or
> f. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;

N.D. CENT. CODE § 29-32-01 (1974).

250. State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982).

251. 338 N.W.2d at 628.

252. *Id.* North Dakota Century Code § 29-32-06 provides that a court may grant a motion for summary disposition of an application for post-conviction relief if it appears from the documents submitted that the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. N.D. CENT. CODE § 29-32-06(3) (1974).

253. 338 N.W.2d at 630.

254. *Id.* at 631.

255. *Id.* at 629. Skjonsby alleged that his attorneys fabricated the testimony that Charlotte Skjonsby gave at trial. *Id.* Charlotte Skjonsby later pleaded guilty to perjury in connection with her testimony at the trial. *Id.*

256. *Id.* Skjonsby claimed that various drugs and medications administered to him while he was incarcerated clouded his thinking and increased his susceptibility to the pressures of his counsel. *Id.*

own defense.[257] The district court further found that Skjonsby knowingly embraced the fabricated testimony given at trial.[258]

The supreme court indicated that Skjonsby's application and supporting evidence raised issues of fact about his competence to stand trial at the time he was convicted.[259] The supreme court held that when an application for post-conviction relief raises an issue of material fact, section 29-32-06 of the North Dakota Century Code requires the district court to hold a full evidentiary hearing.[260] Therefore, the supreme court remanded the case to the district court for an evidentiary hearing.[261]

State v. Walden

In *State v. Walden*[262] Walden appealed his conviction of attempted sexual imposition.[263] Walden raised three issues on appeal: whether he was actually advised of his *Miranda* rights;[264] whether his written confession was voluntary;[265] and whether the State's evidence was sufficient to sustain his conviction.[266]

Although the State conceded that Walden was not fully advised of his rights,[267] the court held that the defendant was estopped from asserting infringement because he interrupted the officer during the reading of the *Miranda* warnings.[268] The State had made a reasonable effort to comply with the dictates of *Miranda*.[269] The court also held that Walden's waiver of his right to remain silent and his subsequent statement were voluntary because he was in control of his faculties, despite Walden's claim that he was tired, intoxicated, and coerced by police.[270] Finally, the supreme court agreed with the trial court's conclusion that Walden's conviction was supported by sufficient evidence.[271]

257. *Id.* at 630. The district judge made these conclusions based on his own observations of Skjonsby during the trial and psychiatric evaluations of Skjonsby made prior to trial. *Id.*

258. *Id.*

259. *Id. See also* N.D. CENT. CODE § 29-32-06(2) (1974). Section 29-32-06(2) provides that a summary disposition of an application for post-conviction relief is not proper if a material issue of fact exists. *Id.*

260. 338 N.W.2d at 631. *See also* N.D. CENT. CODE § 29-32-06 (1974).

261. 338 N.W.2d at 631. The supreme court noted that it was not expressing any views on the credibility of Skjonsby's allegations. *Id.* at 630-31. The court merely believed that Skjonsby was entitled to a hearing on his application. *Id.* at 630.

262. 336 N.W.2d 629 (N.D. 1983).

263. State v. Walden, 336 N.W.2d 629, 631 (N.D. 1983).

264. *Id.* at 631.

265. *Id.* at 632.

266. *Id.* at 633.

267. *Id.* at 631.

268. *Id.* at 632.

269. *Id.*

270. *Id.* at 633.

271. *Id.* at 634.

Although there was some conflicting evidence regarding whether Walden had taken a substantial step toward committing a sexual act or was merely attempting to knock the phone from the victim's hand,[272] one of the conflicting inferences reasonably tended to prove guilt and fairly warranted a conviction.[273] The court, therefore, affirmed Walden's conviction.[274]

State v. Wingerter

In *State v. Wingerter*[275] the defendant was convicted of escape from "official detention" pursuant to section 12.1-08-06 of the North Dakota Century Code.[276] Section 12.1-08-06 provides that a person is guilty of escape from official detention when he is detained in a facility "under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance."[277]

The defendant in *Wingerter* threw a tire iron through a window of a local residence while he was receiving mental health treatment.[278] The assistant state's attorney suggested that the police file a petition for civil commitment rather than go ahead with criminal prosecution, even though she had a very strong case.[279] The defendant was subsequently committed to the North Dakota State Hospital, where he later used force to escape.[280] On appeal Wingerter asserted he could not be charged with escape because he was not in official detention.[281] The defendant argued that he was not in official detention because no criminal charge had been filed with regard to the tire iron incident; there was nothing in his commitment papers to indicate that he had been committed in lieu of criminal proceedings or that criminal charges were being held in abeyance; and there was nothing in his medical records at the State Hospital to indicate that he was committed because of an alleged criminal act.[282] The supreme court agreed with the defendant's contention that for him to be in official detention some kind of documentation was necessary to show that he was committed in

272. *Id.*
273. *Id.*
274. *Id.*
275. 334 N.W.2d 475 (N.D. 1983).
276. N.D. CENT. CODE § 12.1-08-06(3)(a) (1976).
277. *Id.*
278. State v. Wingerter, 334 N.W.2d 475, 476 (N.D. 1983).
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 476-77.

lieu of criminal proceedings.[283]

Noting that due process requires that a defendant be given notice of forbidden conduct, the court concluded that the lower court must specifically determine that the civil commitment was in lieu of criminal proceedings or criminal proceedings were held in abeyance.[284] The court noted that considerable doubt as to this issue would be eliminated if the legislature enacted "a statute specifically authorizing civil commitment in lieu of criminal proceedings or authorizing civil commitment while criminal proceedings are held in abeyance."[285] Thus, the court reversed the defendant's criminal conviction.[286]

DAMAGES

Blair v. Boulger

In *Blair v. Boulger*[287] Blair appealed a judgment awarding Boulger $2500 compensatory damages and $5000 exemplary damages for Blair's intentional interference with contractual relations between Boulger and Blair's mother.[288] Blair contended that the trial court's award of compensatory damages represented compensation for attorney's fees and therefore was improper.[289] Boulger argued that the $2500 award did not represent an award of attorney's fees, but even if it did, the award was proper as a "third party" exception [290] to the general rule that an award of attorney fees are not permitted.[291]

The court noted that although attorney's fees may not be awarded as an element of damages in the absence of contractual or statutory authority, sound reasoning and good judgment supported recognition of some form of the third-party exception.[292] The court

283. *Id.* at 477.
284. *Id.* at 477-78.
285. *Id.* at 478 (footnote omitted).
286. *Id.* at 479.
287. 336 N.W.2d 337 (N.D. 1983).
288. Blair v. Boulger, 336 N.W.2d 337, 338 (N.D. 1983).
289. *Id.* at 339. *See* Hage v. Burleigh County Water Management Dist., 331 N.W.2d 23, 31 (N.D. 1981) (as a general rule, attorney's fees are not recoverable as an item of damages).
290. 336 N.W.2d at 339. The court noted:

> The exception, sometimes called the "third party" exception, states that where the wrongful acts of one party, (A), cause another, (B), to bring or defend an action against a third party, (C), then (B) in a later action against (A) may recover the costs of litigation, including attorney fees, incurred by (B) in bringing or defending the earlier action against (C) which was the direct result of (A)'s wrongful act.

Id. at 339-40. (citing Campus Sweater & Sportswear v. M. B. Kahn Const., 515 F. Supp. 64 (D.S.C. 1979)).
291. 336 N.W.2d at 339.
292. *Id.* at 340.

stated that the person seeking to recover attorney's fees under the third-party exception must have been forced to bring or defend an earlier action against a third party.[293] Examining the facts in the case before it, the court found that the third-party exception was applicable.[294] The court stated that as long as the wrongful acts of a person caused another to become involved in litigation with a third party, the expense of litigation against the third party may be recovered from the wrongdoer regardless of whether the action to recover attorney's fees is brought in the same proceeding, or as in the instant case, in a subsequent proceeding.[295] Blair contended that since he was a party to the action, the third-party exception should not apply.[296] The court found that he was not a party to the original contract on which the action was based; thus, the third-party exception was applicable.[297]

Halvorson v. Voeller

In *Halvorson v. Voeller*[298] the Supreme Court of North Dakota addressed the issue of whether evidence of a motorcyclist's failure to wear a protective helmet was admissible on either the issue of liability or damages.[299] Halvorson received severe brain injury when his motorcycle collided with Voeller's automobile.[300] Halvorson was not wearing a protective helmet.[301] At trial the jury found Voeller 92 percent negligent and awarded Halvorson $2,767,324.61 in damages.[302] Voeller was not allowed to present evidence that Halvorson's failure to wear a protective helmet was a cause of the accident and contributed to his head injuries.[303]

On appeal the supreme court held that evidence of Halvorson's failure to wear a protective helmet was admissible to reduce his damage award if competent testimony by a qualified expert that the use of a helmet would have lessened his injuries existed.[304] On the issue of liability, the court held that evidence of a

293. *Id. See* 4 RESTATEMENT (SECOND) OF TORTS § 914 (stating general proposition in support of third-party exceptions).
294. 336 N.W.2d at 340.
295. *Id. See, e.g.*, Wauen v. McLauth Steel Corp., 111 Mich. App. 496, ____, 314 N.W.2d 666, 672 (1981).
296. 336 N.W.2d at 340-41.
297. *Id.* at 341.
298. 336 N.W.2d 118 (N.D. 1983).
299. Halvorson v. Voeller, 336 N.W.2d 118, 119 (N.D. 1983).
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at 121.

failure to wear a helmet was not admissible unless the facts of the particular case indicated that the failure was a contributing cause of the accident.[305]

The trial court reasoned that to admit evidence of the nonuse of a helmet would create a common law duty to wear a helmet when no statutory duty existed.[306] The supreme court disagreed, and stated that the lack of a statutory duty did not preclude the creation of a duty by the judiciary through well-recognized principles of law.[307] The court noted that comment c to section 465 of the Restatement (Second) of Torts allowed apportionment of damages when the antecedent negligence of the plaintiff was a substantial contributing factor to the ensuing harm, notwithstanding the fact that the plaintiff was not a cause of the accident.[308] The court stated that under the doctrine of avoidable consequences a plaintiff's failure to use a safety device in mitigation of damages would allow apportionment of damages regardless of whether the plaintiff's negligence preceded or succeeded the defendant's negligence.[309]

The court cautioned that admission of evidence of the nonuse of a helmet must be preceded by a jury determination that a reasonable person exercising ordinary care would have worn a helmet to avoid injury in the event of an accident.[310] Only after that determination, accompanied by competent expert testimony, might the evidence be admitted.[311] If the evidence showed that the use of a helmet would have reduced the plaintiff's injuries, the jury must reduce any damage award to the extent a helmet would have lessened the injuries incurred.[312] The burden of proving that a

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305. *Id.*
306. *Id.* at 119.
307. *Id.* at 122.
308. *Id.*
309. *Id.* at 120 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 423-24 (4th ed. 1971)).
310. 336 N.W.2d at 121.
311. *Id.*
312. *Id.* The court used the following hypothetical to demonstrate proper procedure for reducing a damage award:

> Assume: *X*, driving a car, and *Y*, driving a motorcycle, get in an accident. *Y* is not wearing a helmet. The jury finds *X* is 60 percent liable for causing the accident, making *Y*, the motorcyclist, 40 percent liable for causing the accident. The jury also finds *Y* would have avoided 60 percent of his injuries if he had worn a helmet; therefore, *X* is 40 percent liable for causing *Y*'s injuries. *Y* proves $100,000 in damages.
>
> On the basis of these findings, the $100,000 award should be reduced by 40 percent, which accounts for *Y*'s contributing to the cause of the accident. Hence, the award is diminished to $60,000.
>
> The $60,000 should now be reduced to the extent that *Y*'s injuries would have been less had he worn a helmet, i.e., 60 percent. This adjustment leaves a total award of $24,000.

Id. at 121-22 n.2.

reasonable person would have worn a safety helmet and that the failure to wear a helmet increased the injuries incurred was on the defendant.[313]

DOMESTIC RELATIONS

Aaker v. Aaker

In *Aaker v. Aaker*[314] a husband and a wife were divorced on April 13, 1972. The divorce judgment gave the plaintiff-wife custody of the parties' child and ordered the defendant-husband to pay child support in the sum of $50 a month until the child's eighteenth birthday, until the child was legally adopted, or until further order of the court.[315] Almost eleven years later, the wife requested the court to increase the child support from $50 to $250 per month and to order the defendant to be responsible for all of the minor child's medical, dental, and optical expenses.[316] The parties made a tentative stipulation to increase the support obligation to $100 per month.[317] The trial court entered an order requiring the husband to pay $100 per month initially, to be increased to $150 per month at a later date. The husband appealed.[318]

The Supreme Court of North Dakota held that the stipulation of increase in child support obligation to $100 per month was constructively accepted by the parties, even though customary formal acceptance was not accomplished.[319] The supreme court also held, however, that the trial court erred in increasing the support obligation to $150 per month without first giving notice to the parties of its intention to modify the stipulation.[320]

The supreme court indicated that since neither party had denied the existence of the stipulation, the court would assume that the parties agreed to the stipulation.[321] The court acknowledged that the district court had the authority to either accept or reject a

313. *Id.* at 121.
314. 338 N.W.2d 645 (N.D. 1983).
315. Aaker v. Aaker, 338 N.W.2d 645, 646 (N.D. 1983).
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 647. The supreme court said that oral stipulations of the parties in the presence of the court are generally binding, especially when acted upon or entered in the court's records. *Id.* Such a stipulation need not be signed by the parties or their attorneys. *Id.*
320. *Id.* at 648. If the stipulation does not affect the public and is of a private nature, a judge has greater liberty to accept it. *Id.* However, a judge can only add to it after informing the parties beforehand. *Id.*
321. *See* N.D. RULES OF COURT 11.3 (1983) (stipulations are binding when made in open court and read into record).

stipulation.[322] Adding to the stipulation without first informing the parties or obtaining their consent, however, was another matter.[323] Had the parties been told that the court would add further financial and other requirements, they would have been in a position to submit additional evidence supporting the stipulation and provide reasons for entering into the stipulation.[324] The supreme court, therefore, remanded and ordered the trial court to amend the judgment to conform to the stipulation.[325]

ELECTION LAW

Haugland v. Meier
Lips v. Meier
Haugland v. Meier

The North Dakota Supreme Court recently defined the limits of what can be contained in state referendum petitions. The petitioners in *Haugland v. Meier (Haugland I)*,[326] *Lips v. Meier*,[327] and *Haugland v. Meier (Haugland II)*[328] sought review of the decision of the Secretary of State approving two referendum petitions. In *Haugland I* the petition sought referral of a house bill changing the name of Minot State College to Dakota Northwestern University.[329] In *Lips* the petition called for the referral of a senate bill that gave the state control and funding responsibility for three junior colleges.[330] *Haugland II* involved a petition that designated the next general election as the period for North Dakotans to decide

322. 338 N.W.2d at 647. The court noted that the settlement of disputes should be encouraged whenever possible. *Id.* at 647-48. *See* 15A AM. JUR. 2D *Compromise and Settlement* § 5 (1976).

323. 338 N.W.2d at 647.

324. *Id.* at 648.

325. *Id.* The supreme court remanded the case to the trial court with instructions to amend the judgment to allow for $100 per month plus one-half of all medical and dental expenses of the child. *Id.*

326. 335 N.W.2d 809 (N.D. 1983).

327. 336 N.W.2d 346 (N.D. 1983).

328. 339 N.W.2d 100 (N.D. 1983).

329. Haugland v. Meier, 335 N.W.2d 809, 810 (N.D. 1983). The plaintiffs in *Haugland I* challenged the following provision of the referendum: " 'House Bill No. 1500 would rename Minot State College to Dakota Northwestern University. This would increase the number of universities in the state from two to three, with commensurate increases in state funding responsibilities.' " *Id.* at 811.

330. Lips v. Meier, 336 N.W.2d 346, 346 (N.D. 1983). The plaintiffs in *Lips* attacked the following portion of the referendum:

> Senate Bill 2073 would take three junior colleges (Bismarck Junior College, University of North Dakota-Williston Center, and Lake Region Community College) now under the control of local school districts and put them under the control of the North Dakota Board of Higher Education. The burden of financing these institutions would then become the responsibility of the State of North Dakota.

Id.

the college name-change issue.[331]

The supreme court in *Haugland I* noted that Article III of the North Dakota Constitution reserves to the people the power to refer legislative acts for their rejection or approval.[332] Relying on the decision of *McCarney v. Meier*,[333] the North Dakota Supreme Court asserted that it is not bound by the Secretary of State's interpretation of the constitution because the secretary's determination of the propriety of the petition was a ministerial act.[334] The *Haugland I* court determined that the inclusion of the extraneous material in the petition would "open the process to misleading information and even to mudslinging and partisan tactics."[335] The supreme court concluded that the Secretary of State erred in failing to disapprove the petitions because they contained the extraneous statement of intent.[336]

The North Dakota Supreme Court reached a similar conclusion in *Lips*.[337] The court noted that Article III of the North Dakota Constitution specifies that all decisions of the Secretary of State in regard to referendum petitions shall be subject to review by the court.[338] Relying on *Haugland I*, the supreme court again concluded that "[i]t was therefore improper for the secretary of state to decline to consider the extraneous statement contained in the Statement of Intent in this case."[339]

The supreme court in *Haugland II* upheld the Secretary of State's approval of the amended *Haugland I* petition.[340] The *Haugland II* court noted that the challenged provisions of the petition should have been eliminated, even though the statements were not extraneous statements of intent.[341] The court, however, held that the sponsors' good faith submission of the petition, erroneous reliance upon prior case law, and lack of time in which to

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331. Haugland v. Meier, 339 N.W.2d 100 (N.D. 1983). The statement in *Haugland I* specified that the referendum be held at the next *primary* election. *Id.* at 102.

332. 335 N.W.2d at 810. *See* N.D. CONST. art. III.

333. 286 N.W.2d 780 (N.D. 1979).

334. 335 N.W.2d at 811. The *Haugland* court declared, " 'Under the principle of separation of powers, courts do not substitute their judgment for that of an executive officer who has exercised a discretionary function. [citation omitted]. That has no application, however, to ministerial acts.' " *Id.* (quoting *McCarney*, 286 N.W.2d at 783).

335. 335 N.W.2d at 811.

336. *Id.*

337. 336 N.W.2d 346 (N.D. 1983).

338. *Id.* at 348. *See* N.D. CONST. art. III §§ 6-7.

339. *Id.* at 347 (quoting *Haugland I*, 335 N.W.2d at 811).

340. 339 N.W.2d 100 (N.D. 1983).

341. *Id.* at 106. Specifically, the petitioners challenged the portion of the amended petition which specified that the measure be placed on the ballot of the next general election, and the provision which stated that each petition contained signatures from more than two percent of the state's population. *Id.* at 105-06.

make corrections or amendments constituted a form of excusable neglect that required approval of the amended petition.[342]

State ex rel. Olson v. Bakken

In *State ex rel. Olson v. Bakken*[343] the Grand Forks county auditor and canvassing board appealed from a district court decision ordering a special election limited to voters whose votes were not counted in the general election.[344] The issues raised were whether the district court could properly direct a new election limited to 526 voters whose votes were not counted[345] and whether the district court could direct the governor to order the new election.[346]

The petitioners contended that the North Dakota Constitution gave each house power to decide whether the election of a member of its house was valid.[347] The court agreed that each house has the final authority to decide its membership.[348] The court concluded, however, that the district court did have jurisdiction and could properly entertain election results.[349] The supreme court decided that the district court could not order the governor to hold a special election if the governor was not a party to the contest.[350] The court held that in this case the district court had jurisdiction to direct the county auditor, not the governor, to conduct a special election.[351]

GOVERNMENT

American Federation of State, County & Municipal Employees v. Olson

In *American Federation of State, County & Municipal Employees v. Olson*[352] American Federation (Union) appealed from a district

342. *Id.* at 107. The *Haugland II* court warned that the repetition of similar errors in the future would not qualify as a form of excusable neglect. *Id.*

343. 329 N.W.2d 575 (N.D. 1983).

344. State *ex rel* Olson v. Bakken, 329 N.W.2d 575, 577 (N.D. 1983). The controversy arose during the 1982 North Dakota House of Representatives election for District 42. Because of improper use of a ballot label, 526 votes were cast mistakenly. The race was close enough that had the 526 votes been counted a different outcome could have resulted. *Id.* at 576.

345. *Id.* at 577.

346. *Id.* at 579.

347. *Id.* at 577. Petitioners referred to art. IV, § 26 of the North Dakota Constitution. *See* N.D. CONST. art. IV, § 26. Article IV, § 26 provides, "Each house shall be the judge of the election returns and qualifications of its own members." *Id.*

348. 329 N.W.2d at 579.

349. *Id.*

350. *Id.* at 581.

351. *Id.* at 582.

352. 338 N.W.2d 97 (N.D. 1983).

court's summary judgment that denied State Highway Department employees an eight percent pay raise.[353] The Union previously obtained the pay raise under a collective bargaining agreement with the State Highway Commissioner.[354] The Union alleged as erroneous the lower court's decision that, absent specific statutory authority, the State Highway Commissioner was without actual or implied authority to enter into a collective bargaining agreement.[355] The Union further alleged that, because the legislature provided for salary increases for state employees by appropriating funds for their pay increases, the Governor's act of cancelling the raises was an unconstitutional veto under the North Dakota Constitution.[356]

The supreme court affirmed the trial court's decision and held that the agreement between the Union's bargaining representative and the Highway Commissioner was void.[357] The court stated that it was well settled that public officials had only such authority as they were expressly given.[358] The court stated that public employees were specifically exempted from North Dakota's laws authorizing private sector collective bargaining through representatives.[359] After noting that the attorney general gave the Union notice that the agreement was void,[360] the court took judicial notice of the legislature's repeated refusals to enact legislation mandating collective bargaining for public employees.[361] In dispensing with the constitutional issues, the court characterized the legislative appropriations as creating mere expectations, the denial of which fall far short of the harm required for relief in the courts.[362] Based on its past definitions of appropriations,[363] the court concluded that the appropriations in question did not mandate that state employees receive salary increases.[364]

353. American Fed. of State, County & Mun. Employees v. Olson, 338 N.W.2d 97, 99 (N.D. 1983).
354. *Id.*
355. *Id.* at 100.
356. *Id.* at 99 (citing N.D. CONST. art. V, § 10).
357. 338 N.W.2d at 102.
358. *Id.* at 100 (citing Kopplin v. Burleigh County, 77 N.D. 942, 47 N.W.2d 137 (1951)).
359. 338 N.W.2d at 101. *See* N.D. CENT CODE ch. 34-12 (1976) (North Dakota's Labor-Management Relations Act).
360. 338 N.W.2d at 100.
361. *Id.* at 102 n.1. (citing H.B. 1448, 48th Leg. Sess., 1983. S. B. 2420, 47th Leg. Sess., 1981; H.B. 1663, 46th Leg. Sess. 1979; H.B. 1471, 45th Leg. Sess., 1977).
362. 338 N.W.2d at 102-03.
363. *See* Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962).
364. 338 N.W.2d at 103.

INTERPRETATION AND CONSTRUCTION OF STATUTES

Olson v. Molacek Brothers

In *Olson v. Molacek Brothers*[365] Olson appealed from a summary judgment granted in favor of the Molaceks. Olson brought suit alleging that the Molaceks had knowingly sold diseased cattle to him in violation of North Dakota statutory law[366] and, therefore, were liable for damages under theories of strict liability and negligence.[367] The Molaceks claimed that the Uniform Commercial Code (UCC), codified at title 41 of the North Dakota Century Code,[368] applied and preempted the statutory law relied upon by Olson.

The supreme court held that the applicable provisions of the UCC were subordinate to statutory laws regulating sales to farmers or consumers, or other specified classes of buyers.[369] The court noted that even if the Molaceks were correct in their claim, they failed to comply with the provision on which they relied.[370] This noncompliance also made the matter inappropriate for summary judgment.[371]

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365. 341 N.W.2d 375 (N.D. 1983).

366. Olson v. Molacek Bros., 341 N.W.2d 375, 377 (N.D. 1983). Olson relied upon § 36-14-01 of the North Dakota Century Code, which provides:

> No person shall sell, give away, or in any manner part with any animal infected with or suspected of being infected with any contagious or infectious disease, except as may be provided otherwise by the rules and regulations of the state livestock sanitary board. If any animal is known to have been infected with or exposed to any such disease within one year prior to such disposal, due notice of such fact shall be given in writing to the person receiving the animal.

N.D. CENT. CODE § 36-14-01 (1980).

367. 341 N.W.2d at 377. Olson relied upon § 36-14-22 of the North Dakota Century Code, which provides that "[e]very person violating any of the provisions of this chapter shall be liable in a civil action. . . ." N.D. CENT. CODE § 36-14-22 (1980).

368. 341 N.W.2d at 377. The Molaceks relied upon § 41-02-33(3)(e) of the North Dakota Century Code, which states that no implied warranty of fitness arises out of a sale of cattle if the seller has complied with all state and federal animal health regulations. *Id. See* N.D. CENT. CODE § 41-02-33(3)(e) (1983).

369. 341 N.W.2d at 378. The *Olson* court applied § 41-02-02 of the North Dakota Century Code, which provides:

> Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers.

N.D. CENT. CODE § 41-02-02 (1983) [U.C.C. § 2-102 (1978)].

370. 341 N.W.2d at 378-79.

371. *Id.* at 379.

State v. Backer

In *State v. Backer*[372] the district court ordered the confiscation and sale of Backer's vehicle, which he used in violation of game and fish laws.[373] The district court found that Backer was an "alleged offender" within the provisions of section 12.1-10-01 of the North Dakota Century Code.[374] On appeal Backer contended that according to section 12.1-10-01 of the North Dakota Century Code a person must be charged with a violation of game and fish laws before in rem jurisdiction over the confiscated property could be obtained.[375] Because no person was formally charged with a violation of game and fish laws, according to Backer, the district court had no jurisdiction over the confiscated vehicle.[376]

The supreme court held that the game and fish laws did not require that an alleged offender be charged with a violation of title 20.1 as a prerequisite to the confiscation and sale of property used in violation of the statute.[377] The court stated that the procedure for the confiscation and sale of a vehicle used in violation of game and fish laws was an in rem proceeding in which the vehicle was both the res and the defendant.[378] In addition to the district court having jurisdiction over the vehicle, the district court complied with the statutory requirements of sections 20.1-10-01 and 20.1-10-03 of the North Dakota Century Code, thus giving the district court authority to order the confiscation and sale of Backer's vehicle.[379]

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372. 331 N.W.2d 4 (N.D. 1983).

373. State v. Backer, 331 N.W.2d 4, 5 (N.D. 1983). *See generally* N. D. CENT. CODE tit. 20.1 (1978 & Supp. 1983) (game and fish laws).

374. 331 N.W.2d at 5. *See also* N.D. CENT. CODE § 21.1-10-01 (1978).

375. 331 N.W.2d at 5. Backer argued that because the term "alleged offender" was used in § 20.1-10-01 instead of the term "owner," a court must obtain in personam jurisdiction over an alleged offender in order to obtain in rem jurisdiction over the confiscated property. *Id.* Backer argued that he must first be formally charged with a violation of the game and fish laws in order to be considered an alleged offender. *Id.*

376. *Id.*

377. *Id.* at 6. The court stated that the term "alleged offender" was used in title 20.1 because the owner and alleged offender might not be the same person. *Id.* The court stated, "Bringing the 'alleged offender' before the court for the purpose of determining disposition of confiscated property ensures that an individual with a sufficient nexus to the alleged offense is given an opportunity to be heard prior to the disposition of the unlawfully used property." *Id.*

378. *Id.* The confiscation of the vehicle, or the issuance of a receipt assuring delivery before the court, was the equivalent of process and gave a court having jurisdiction over the alleged offense jurisdiction over the res. *Id.* at 7.

379. *Id.* The court stated that, although it was not a prerequisite to a court's obtaining in rem jurisdiction over confiscated property, the requirement that an alleged offender be brought before a court to determine disposition of property might be a prerequisite to a court-ordered sale of the property. *Id.* In addition, the owner of the property must have been given notice and an opportunity to be heard. *Id.* Because Backer was both the alleged offender and owner of the vehicle and was given notice and an opportunity to be heard, the district court could properly order the confiscation and sale of his vehicle. *Id.*

Winkler v. Gilmore & Tatge Manufacturing Co.

In *Winkler v. Gilmore & Tatge Manufacturing Co.*[380] Kent Manufacturing (Kent) appealed from a judgment directing Kent to pay attorney's fees and costs incurred by Gilmore while defending a products liability action brought by Richard Winkler for injuries he suffered when he fell from a grain dryer ladder.[381] Kent raised three issues: whether a manufacturer is obligated to provide a defense for a seller under the provisions of section 28-01.1-07 of the North Dakota Century Code when the manufacturer is liable and the seller is free of fault;[382] whether a seller who is also a manufacturer is precluded from seeking indemnity from another manufacturer; and whether the questing of a seller's right to indemnity should be presented to the jury or determined by the court.[383]

The North Dakota Supreme Court affirmed the trial court's judgment and held that the statute authorizes a seller to recover its costs of defense from a manufacturer in a products liability action only after the trier of fact finds the manufacturer liable and attributes none of the fault to the seller.[384] The court further held that the definition of "seller" contained in the North Dakota Products Liability Act[385] included a manufacturer who was also a

380. 334 N.W.2d 837 (N.D. 1983).

381. Winkler v. Gilmore & Tatge Mfg. Co., 334 N.W.2d 837, 838 (N.D. 1983). Winkler brought suit for personal injuries and consequential damages against Kent, a manufacturer of grain dryers; Gilmore, a seller; Dakon, Inc., a distributor; and Hausauer Implement, a retail seller. *Id.* The jury attributed 50% of the cause of damages to Hausauer Implement, 36% of the cause of damages to Kent, and 14% to Winkler. *Id.*

382. N. D. CENT. CODE § 28-01.1-07 (Supp. 1983). Section 28-01.1-07 provides:

> *Indemnity of seller.* If a products liability action is commenced against a seller, and it is alleged that a product was defectively designed, contained defectively manufactured parts, had insufficient safety guards, or had inaccurate or insufficient warnings; that such condition existed when the product left the control of the manufacturer; that the seller has not substantially altered the product; and that the defective condition or lack of safety guards or adequate warnings caused the injury or damage complained of; the manufacturer from whom the product was acquired by the seller shall be required to assume the cost of defense of the action, and any liability that may be imposed on the seller.

Id.

383. 334 N.W.2d at 839.

384. *Id.* at 841.

385. N.D. CENT. CODE § 28-01.1-06 (Supp. 1983). Section 28-01.1-06 provides in relevant part:

> For purposes of . . . section 28-01.1-07:
>
> 1. "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a manufacturer with specifications, relevant to the alleged defect, for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to

seller and that a manufacturer could seek indemnity from another manufacturer as long as that manufacturer-seller did not exercise control over the design and manufacture of the defective product.[386] The court also held that the question of a seller's right to indemnity could be submitted to the jury in the form of a special verdict,[387] but if the parties did not demand that the issue go before the jury, the court might properly determine the issue.[388]

The *Winkler* court determined that whether a seller was also a manufacturer depended on whether the seller exercised control over the design and manufacture of the product.[389] The court found that the evidence presented at trial showed Gilmore did little more than place its private label on the product.[390] Therefore, Gilmore could properly be considered a seller for purposes of indemnity.[391]

Finally, the court addressed the question of whether the trial court erred in not allowing the jury to decide whether Gilmore was a seller. The court found that Kent failed to submit a proposed question and to demand that the issue go before the jury.[392] The court concluded that it was proper for the trial court to make a finding on that issue pursuant to the North Dakota Rules of Civil Procedure.[393]

LIABILITY

Schlenk v. Northwestern Bell Telephone Co.

In *Schlenk v. Northwestern Bell Telephone Co.*[394] Schlenk appealed

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the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he:

a. Does not otherwise specify how the product shall be produced; or
b. Does not control, in some significant manner, the manufacturing and process of the product, and the seller discloses the actual manufacturer.

. . . .

3. "Seller" means any individual or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling or leasing any product for resale, use, or consumption.

Id.

386. 334 N.W.2d at 841-42.
387. *Id.* at 842. *See* N.D.R. CIV. P. 49 (a) (special verdicts).
388. 334 N.W.2d at 842.
389. *Id.* at 841.
390. *Id.* at 842.
391. *Id.*
392. *Id. See* N.D.R. CIV. P. 49(a). Rule 49(a) provides that if the court omits any issue of fact raised by the evidence each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. *Id.*
393. 334 N.W.2d at 841. *See* N.D.R. CIV. P. 49 (a) (special verdicts).
394. 329 N.W.2d 605 (N.D. 1983).

to the supreme court seeking recovery for injuries sustained when he was entangled in a wire winder machine.[395] At the time of his injury, Schlenk was employed by Aerial Contractors, Inc., an independent contractor hired by Northwestern Bell (Bell).[396] Schlenk raised the issue of whether Bell was liable for his injuries based upon an exception to the general rule of employer nonliability for acts or omissions of its independent contractor.[397]

The supreme court examined the four exceptions to the general rule of employer nonliability raised by Schlenk.[398] The first exception that the court examined was whether Bell should be vicariously liable for Schlenk's injury because the operation of the wire winder was peculiarly risky and inherently dangerous.[399] The court determined that in order to meet the peculiar risk requirement, the risk must be likely to arise in the ordinary and reasonable method of doing work.[400] The court concluded that the evidence revealed that the risk to Schlenk was not inherent or peculiar to the ordinary operation of the wire winder but arose out of improper use by Schlenk.[401]

The second exception to the employer nonliability rule examined by the court was the contention by Schlenk that Bell had a nondelegable duty[402] to ensure that the wire winder was operated in a safe manner.[403] The nondelegable duty arises by statute or administrative regulation.[404] The court determined that the statute or regulation[405] that Schlenk contended imposed a duty on Bell was merely advisory and imposed no duty.[406]

The third exception examined by the court was whether Bell

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395. Schlenk v. Northwestern Bell Tel. Co., 329 N.W.2d 605, 606 (N.D. 1983).
396. *Id.* at 606.
397. *Id.* at 607.
398. *Id.* at 608.
399. *Id.*
400. *Id.* at 610.
401. *Id.* At the time of the injury, Schlenk was operating the wire winder by himself. *Id.* The ordinary manner of operating the wire winder was to have two workers operate the machine. *Id.*
402. *Id.* at 611. Section 424 of the Restatement (Second) of Torts provides:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

RESTATEMENT (SECOND) OF TORTS § 424 (1965).
403. 329 N.W.2d. at 611.
404. *Id.*
405. *Id.* Schlenk maintained that the statute or regulation set forth in § 432 (C) (4) of the National Electrical Safety Code of the American National Standards Institute, Inc., imposed the nondelegable duty. Section 432 (C) (4) provides, "Employees should avoid contact with moving winch lines, especially near sheaves, blocks, and take-up drums." NAT'L ELEC. SAFETY CODE § 432(c)(4).
406. 329 N.W.2d at 611.

was liable based upon its negligent exercise of retained control.[407] The court determined that Bell's retention of supervisory controls was not sufficient to impose direct liability.[408]

The fourth exception examined by the court was Bell's direct liability based upon the negligent selection of Aerial Contractors, Inc.[409] The court determined that to render an employer liable for negligently selecting an independent contractor a party must establish that, at the time of hiring, the employer had knowledge that the independent contractor was incompetent.[410] No such evidence existed in this case.[411] Thus, the court held that the evidence did not establish that Bell owed a duty to Schlenk under any exceptions to the general rule of employer nonliability.[412]

MENTAL HEALTH

In re Ebertz

In *In re Ebertz*[413] Ebertz appealed from an order of the county court for alternative outpatient treatment at South Central Human Services Center in Jamestown.[414] Ebertz was committed on February 26, 1983 under the emergency commitment procedures of section 25-03.1-25 of the North Dakota Century Code.[415] Two days later, after a conference with Michael Schmidt, Ph.D., Ebertz voluntarily admitted himself to the State Hospital for treatment.[416]

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407. *Id.* at 611-12. *See also* RESTATEMENT (SECOND) OF TORTS § 414 (1965). Section 414 provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Id.

408. 329 N.W.2d at 613.

409. *Id.* Exceptions to the general rule of employer nonliability in negligence actions is found in § 411 of the Restatement (Second) of Torts which provides:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

RESTATEMENT (SECOND) OF TORTS § 411 (1965).

410. 329 N.W.2d at 614.

411. *Id.*

412. *Id.*

413. 333 N.W.2d 786 (N.D. 1983).

414. *In re* Ebertz, 333 N.W.2d 786, 787 (N.D. 1983).

415. *Id. See* N.D. CENT. CODE § 25-03.1-25 (Supp. 1983). Section 25-03.1-25 provides for detention or hospitalization emergency procedures. *Id.*

416. 333 N.W.2d at 787.

On March 14, 1983 Ebertz executed a written request for release.[417]

The superintendent of the State Hospital postponed the release until involuntary commitment proceedings were held.[418] The petition for involuntary commitment was filed March 15, 1983 and the hearing was held in Stutsman County Court on March 16, 1983.[419] Ebertz raised two issues: whether the county court improperly denied his motion to dismiss because the petition filed on March 16, 1983 was not filed within twenty-four hours of his emergency commitment as required by North Dakota Century Code section 25-03.1-26(1)[420] and, in the alternative, whether the emergency commitment proceedings violated his rights.[421]

The supreme court held that while procedures in civil commitment and criminal cases were similar in that they embraced concepts of due process, the purposes and objectives were different.[422] Civil commitment was to benefit the individual and the general public; therefore, the supreme court ultimately was concerned with whether the respondent required commitment.[423] The court found that the county court did not err by refusing to dismiss the petition for involuntary commitment because the focus was on whether due process was afforded in the involuntary commitment hearing and thus, the issue of whether the emergency procedures were violated was not relevant to the inquiry.[424]

In re Kupperion

In *In re Kupperion*[425] a patient in a state mental hospital, using a recently enacted expedited appeal procedure,[426] appealed his involuntary commitment for treatment.[427] Kupperion, the patient,

417. *Id. See* N.D. CENT. CODE § 25-03.1-06 (Supp. 1983). Section 25-03.1-06 provides a right to release from treatment facilities upon application. *Id.*

418. 333 N.W.2d at 787.

419. *Id. See* N.D. CENT. CODE § 25-03.1-23 (Supp. 1983). Section 25-03.1-23 provides for petitions for continuing treatment orders. *Id.*

420. 333 N.W.2d at 787. *See* N.D. CENT. CODE § 25-03.1-26 (1) (Supp. 1983).

421. 333 N.W.2d at 787.

422. *Id.* at 788.

423. *Id.* The purposes and objectives of criminal cases are to protect the public, punish criminals, deter crimes, and develop respect for the laws. *Id.*

424. *Id.* at 789. The supreme court stated that if due process were not afforded in the involuntary commitment hearing a new hearing must be held, unless the county court determined that the respondent was not in need of treatment or involuntary commitment and was to be released. *Id.*

425. 331 N.W.2d 22 (N.D. 1983).

426. N.D. CENT. CODE § 25-03.1-29 (Supp. 1983). The statute more clearly expresses the notice and appeal procedures for person involuntarily committed than the former statute. *Compare* N.D. CENT. CODE § 25-03.1-29 (1978).

427. *In re* Kupperion, 331 N.W.2d 22, 23 (N.D. 1983). Kupperion had voluntarily committed himself to the hospital. *Id.* at 24. When he petitioned for his release, a hospital official sought and obtained an order of involuntary commitment from the Stutsman County Court. *Id.*

raised two issues: whether the supreme court had commenced a hearing of his appeal within fourteen days of his filing of notice of expedited appeal as required by section 25-03.1-29 of the North Dakota Century Code;[428] and whether there was clear and convincing evidence to support the county court's finding that he was mentally ill and in need of treatment.[429]

The supreme court, in a case of first impression, concluded that the statutory fourteen-day period for commencement of an expedited appeal hearing began to run when notice of the appeal was filed with the clerk of the supreme court.[430] Kupperion had argued that the period began to run with the filing of notice of appeal in county court.[431] The court rejected Kupperion's first contention, noting that his interpretation could lead to unreasonably short pre-hearing preparation periods.[432] Therefore, the court held that the hearing had commenced within the statutory period in the instant case.[433]

On the second issue, the supreme court concluded that the county court's finding that Kupperion was mentally ill and in need of treatment was a finding of fact, and not a conclusion of law.[434] On appeal the supreme court noted that it would set aside a trial court's finding of fact only when clearly erroneous.[435] The *Kupperion* court held that in the present case the county court's finding of mental illness and the need for treatment was, in view of the evidence presented, not clearly erroneous.[436] Therefore, the supreme court affirmed the decision of the county court.[437]

In re Nyflot

In *In re Nyflot*[438] the County Court of Cass County involuntarily committed Cynthia Jewel Nyflot to the Jamestown State Hospital.[439] She appealed that decision, but the Supreme Court of North Dakota affirmed the lower court's ruling.[440]

On August 23, 1983, Nyflot's parents filed a petition for her

428. *Id. See* N.D. CENT. CODE § 25-03.1-29 (Supp. 1983).
429. 331 N.W.2d at 24. *See* N.D. CENT. CODE § 25-03.1-29 (Supp. 1983).
430. 331 N.W.2d at 25.
431. *Id.* at 24.
432. *Id.* at 25.
433. *Id.*
434. *Id.* at 27.
435. *Id.*
436. *Id.* at 28.
437. *Id.*
438. 340 N.W.2d 178 (N.D. 1983).
439. *In re* Nyflot, 340 N.W.2d 178, 180 (N.D. 1983).
440. *Id.* at 184.

involuntary treatment.[441] A preliminary hearing was held in which the court found probable cause to believe Nyflot was in need of treatment and ordered that she be detained up to fourteen days at the Jamestown State Hospital.[442]

At the hospital she was examined by a staff psychiatrist, Dr. Cabuso, who concluded that Nyflot was mentally ill and presented a serious risk of harm to herself, others, and property.[443] Dr. Cabuso petitioned the court for an order for involuntary treatment of Nyflot pursuant to section 25-03.1-22 of the North Dakota Century Code.[444] At the subsequent trial Nyflot was ordered to undergo involuntary treatment for a period not to exceed ninety days.[445]

On appeal Nyflot presented four issues.[446] The first issue was whether the petition for involuntary treatment should be dismissed because the petitioner failed to have the respondent examined by an expert examiner.[447] The court held that, although Dr. Cabuso was not a licensed psychiatrist at the initial examination, the majority of the interviews with Nyflot were conducted after Dr. Cabuso's licensure.[448] The respondent also contended that Dr. Cabuso was not "board certified" as a psychiatrist.[449] The court dismissed this contention also, because the court read North Dakota law as not requiring certification.[450] Dr. Cabuso was a licensed physician specializing in psychiatry, which is all the statutes require.[451]

The second issue raised by the respondent was whether the county court lost jurisdiction over the matter by its failure to hold

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441. *Id.* at 180.

442. *Id.*

443. *Id.*

444. *Id. See* N.D. CENT. CODE § 25-03.1-22 (Supp. 1983). Section 25-03.1-22 provides in relevant part:

> If, prior to the expiration of the ninety-day order, the director or superintendent believes that a patient's condition is such that he continues to require treatment, the director or superintendent shall, not less than fourteen days prior to the expiration of the order, petition the court where the facility is located for determination that the patient continues to be a person requiring treatment and for an order of continuing treatment, which order may be for an unspecified period of time. . . .

Id.

445. 340 N.W.2d at 180.

446. *Id.*

447. *Id.* Section 25-03.1-02 (6) of the North Dakota Century Code requires that "an evalution of the respondent's mental status shall be made only by a licensed psychiatrist or clinical psychologist." N.D. CENT. CODE § 25-03.1-02 (6) (Supp. 1983).

448. 340 N.W.2d at 181.

449. *Id.*

450. *Id. See* N.D. CENT. CODE § 25-03.1-02 (6) (Supp. 1983). Section 25-03.1-02 (6) requires that an "expert examiner" be a licensed psychiatrist. *Id.*

451. 340 N.W.2d at 181. Dr. Cabuso was employed as a staff psychiatrist at a South Dakota institution for twelve and one-half years. *Id.*

the treatment hearing within fourteen days after the preliminary hearing.[452] The North Dakota Supreme Court looked at legislative intent in order to construe section 25-03.1-19 of the North Dakota Century Code, which requires a treatment hearing to be held within fourteen days of the preliminary hearing.[453] The court determined that the statute reflected a balance between the due process rights of the respondent and the respondent's possible need for treatment and society's interest in ensuring that the treatment is forthcoming.[454] The court concluded that a construction of the word "shall" as directory rather than mandatory most accurately reflected the intent of the legislature and effectuated the purpose of the legislation.[455] The court noted that the final treatment hearing in this case was continued for "good cause."[456]

The third issue considered by the court related to Dr. Cabuso's failure to include in her report to the county court a clear explanation of how she arrived at the conclusion that Nyflot was a "person requiring treatment."[457] The respondent contended that Dr. Cabuso's report contained no explanation concerning why Nyflot was a "person requiring treatment" and failed to state why she presented a "serious risk of harm" to herself, or the community as required by section 25-03.1-11 (2) of the North Dakota Century Code.[458] The respondent maintained that these failures on the part of Dr. Cabuso denied her notice of the particular issues to be determined at the hearing.[459] The supreme court held that the respondent did have adequate notice because the determination rested on the respondent's willful and overt acts, which clearly demonstrated a "serious risk of harm" to the respondent and to the community.[460] The court found that the due process requirement of notice was not affected by the omissions in Dr. Cabuso's report.[461]

452. *Id.* Respondent cited State *ex rel.* Lockman v. Gerhardstein, 107 Wis.2d 325, 320 N.W.2d 27 (Ct. App. 1982). In *Gerhardstein* the court held that a Wisconsin statute similar to the one at issue in *Nyflot* was mandatory rather than directory and that the trial court lost jurisdiction over the respondent because of its failure to hold a final commitment hearing within fourteen days of the respondent's detention. 107 Wis.2d at ____, 320 N.W.2d at 29.

453. 340 N.W.2d at 181.

454. *Id.* at 182.

455. *Id.* (citing State v. McMorrow, 332 N.W.2d 232, 234 n.2 (N.D. 1983); Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 254 (N.D. 1960)).

456. 340 N.W.2d at 183. The respondent's treatment hearing was delayed one day past the statutory limit in order to provide the court with the assistance of an "expert examiner" and to provide the respondent with the opportunity to test the expert's conclusions through cross-examination. *Id.*

457. *Id.*

458. *Id.* at 183-84. *See also* N.D. CENT. CODE § 25-03.1-11 (2) (Supp. 1983). Section 25-03.1-11 (2) provides that the report is to contain "[a] conclusion as to whether the respondent meets the criteria of a person requiring treatment, with a clear explanation of how that conclusion was derived from the evaluation required." *Id.*

459. 340 N.W.2d at 184.

460. *Id.*

461. *Id.*

The fourth contention raised by the respondent was that the facts did not support the conclusion that she was a person requiring treatment because she did not present a serious risk of harm.[462] The court, however, found respondent's actions, which included starting fires and cutting wire screens on windows, to be a sufficient indication that the respondent presented a serious risk of harm to herself, others, and property.[463] Therefore, the supreme court affirmed the order of the county court.[464]

PROPERTY

Feiler v. Wanner

In *Feiler v. Wanner*[465] Wanner appealed from a summary judgment granted in favor of Feiler in an action by Feiler to quiet title to the mineral rights of a tract of his farmland, which he had sold to the state.[466] The deed conveying the tract contained a mineral reservation clause.[467] The state purchased the tract in order to acquire another tract of land that it needed for construction of a highway, and subsequently sold the tract to Wanner.[468] The North Dakota Century Code provides that fee simple title to land taken for highway purposes does not include mineral rights.[469] The supreme court stated that the issue critical to the determination of the ownership of the mineral interests in the tract was whether the state acquired the tract for highway purposes.[470]

Wanner contended that the tract was purchased by the state through a private sale rather than by eminent domain because the tract was not necessary for highway right of way purposes.[471] Wanner contended that the state acquired fee simple title with the ability to convey the mineral interests to Wanner.[472] The supreme

462. *Id.*

463. *Id.* Nyflot started two separate fires in the women's bathroom at the dormitory. *Id.* The court did not find controlling her subjective intentions nor that little likelihood of harm existed. *Id.* That she was willing to start fires to attract attention was enough for the court to find she did pose a serious risk of harm to herself, others, and property. *Id.*

464. *Id.*

465. 340 N.W.2d 168 (N.D. 1983).

466. Feiler v. Wanner, 340 N.W.2d 168, 168-69 (N.D. 1983). The state sought acquisition of approximately 48 acres of Feiler's farm for construction of U.S. Interstate Highway 94, referred to as tract 1. *Id.* The proposed path of the highway bisected Feiler's farm and rendered a portion of the land, referred to as tract 2, inaccessible from the farmstead. *Id.* at 169. Following negotiations, the parties agreed that the state would purchase both tracts 1 and 2 from Feiler. *Id.*

467. *Id.* The deed for tract 2 provided a mineral reservation clause that stated, "Subject to oil and gas leases, if any, mineral reservations and utility line easements of records." *Id.*

468. *Id. See* N.D. CENT. CODE § 24-01-32 (1978).

469. 340 N.W.2d at 170. *See also* N.D. CENT. CODE § 24-01-01.1 (16) (1978).

470. 340 N.W.2d at 170.

471. *Id.* at 171.

472. *Id.* at 170. *See* N.D. CENT. CODE §§ 24-01-18; -32 (1978).

court rejected both of Wanner's arguments,[473] finding that the state purchased the tract to expedite economical construction of the highway.[474] The court reasoned that since the purchase of the tract involved an element of compulsion, it was more similar to a condemnation in eminent domain than a purchase of land.[475] Thus, the supreme court was guided by the principle that, in eminent domain proceedings, a statute should be construed to leave the owner with the greatest possible estate.[476] The court found additional support for its decision in section 32-15-03.2 of the North Dakota Century Code, which provides that no transfers of property to the state for highway purposes shall include any interest greater than an easement.[477] The court found that the state acquired an easement that did not include the mineral rights to the property.[478] The court, therefore, affirmed the decision of the trial court that the state could not transfer an interest greater than it had and, thus, the rights to the mineral estate remained with Feiler.[479]

Malloy v. Boettcher

In *Malloy v. Boettcher*[480] the North Dakota Supreme Court addressed the issue of "[w]hether or not, in a deed of conveyance, a reservation of a life estate unto a third party, who is a stranger to the title of the property, is effective to convey the life estate to the third party."[481] Previously, in *Stetson v. Nelson,*[482] the North Dakota Supreme Court held that a reservation in a deed to a third party cannot effectively pass title.[483] This holding was consistent with the common law rule.[484]

In *Malloy* the court rejected the common law rule and held that the deed was effective to convey the life estate to the third party.[485] The court stated that the "primary purpose in construing a deed is

473. 340 N.W.2d at 170-71.
474. *Id.* at 170.
475. *Id.* at 171. *See also,* Hamilton v. City of Bismarck, 71 N.D. 321, 300 N.W. 631 (1941).
476. 340 N.W.2d at 171. *See* Wallentinson v. Williams County, 101 N.W.2d 571, 575 (N.D. 1960).
477. 340 N.W.2d at 171. *See also* N.D. CENT. CODE 32-15-03.2 (1976).
478. 340 N.W.2d at 171-72.
479. *Id.* The dissent disagreed with the majority because in its opinion, tract 2 was not taken for highway purposes. *Id.* at 172 (Wallace, District Judge, dissenting).
480. 334 N.W.2d 8 (N.D. 1983).
481. Malloy v. Boettcher, 334 N.W.2d 8, 8 (N.D. 1983). Clyde Boettcher was the sole owner of the property. *Id.* He and his wife executed a deed that purported to reserve a life estate in the property to his wife. *Id.*
482. 118 N.W.2d 685 (N.D. 1962).
483. Stetson v. Nelson, 118 N.W.2d 685, 688 (N.D. 1962).
484. 334 N.W.2d at 8 (citing Stetson v. Nelson, 118 N.W.2d 685 (N.D. 1962)).
485. 334 N.W.2d at 9.

to ascertain and effectuate the intent of the grantor.''[486] The court concluded that the grantor intended to reserve a life estate and to hold otherwise would frustrate the grantor's intention.[487]

Rippley v. City of Lincoln

In *Rippley v. City of Lincoln*[488] plaintiff-landowners brought an inverse condemnation action against the City of Lincoln alleging the city's public-use-only zoning classification of their property constituted a regulatory taking depriving the plaintiffs of all reasonable use of their property, thus entitling plaintiffs to just compensation under Article 1 Section 16 of the North Dakota Constitution.[489]

The supreme court held that the City of Lincoln, by zoning the Rippley's property only for public use, deprived plaintiffs of all reasonable use of their property and, thus, constituted a regulatory taking for which just compensation was required.[490] The court stated that the city's restriction was onerous because the plaintiffs could only sell the property to the party imposing the restrictions; hence the Rippley's were at the mercy of Lincoln as to when, if ever, Lincoln might purchase and use the property for public purposes.[491] The court concluded that the City of Lincoln could either formally condemn the property or continue the offending regulation; but in either case the action must be sustained by compensation.[492]

STATUTES OF LIMITATION

Anderson v. Shook

In *Anderson v. Shook*[493] Anderson appealed from a summary

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486. *Id.*
487. *Id.* at 10.
488. 330 N.W.2d 505 (N.D. 1983).
489. Rippley v. City of Lincoln, 330 N.W.2d 505, 506-07 (N.D. 1983). Lincoln's ''public use'' zoning ordinance limits property uses as follows:
(a) Education group;
(b) Public recreation;
(c) Utility service group;
(d) Buildings and necessary on-site facilities required for conduct of government; or
(e) sewerage treatment plant.

Id. at 507 & n.2. *See also* U.S. CONST. amend. V; N.D. CONST. art. I, § 16.
490. 330 N.W.2d at 509. The court suggested, however, that use of inverse condemnation to fight regulatory taking might not be appropriate in all situations. *Id.*
491. *Id.* at 508.
492. *Id.* at 511 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981)).
493. 333 N.W.2d 708 (N.D. 1983).

judgment based on the running of the two-year statute of limitations in a medical malpractice action.[494] In 1975 Dr. Shook treated Anderson for cancer through the use of external radiation therapy.[495] In 1981 Anderson brought an action against Dr. Shook and his employer, Radiologists, Ltd., alleging that the radiation therapy was negligently administered resulting in permanent injury.[496]

The issue raised by Anderson on appeal was what knowledge was required by the plaintiff in a medical malpractice case in order to cause an action to accrue.[497] The court held that the statute of limitations would begin to run when the plaintiff knows, or with reasonable diligence should know, of her injury, its cause, and the defendant's possible negligence.[498] The court further held that "the limitation of an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof."[499] The *Anderson* court found that "the policies allowing a plaintiff to bring an action when she [had] knowledge of her injury, its cause, and the possible negligence of the physician or hospital [outweighed] those policies that would bar a consideration of the merits of an action brought within the six-year period from the time of the alleged negligent act or omission."[500]

Prior to *Anderson* the North Dakota Supreme Court had determined that the limitation period commenced to run against a malpractice action from the time the act of malpractice with resulting injury was, or by reasonable diligence could have been, discovered.[501] The *Anderson* court went one step further in holding that the plaintiff must additionally know of the cause of the injury

494. Anderson v. Shook, 333 N.W.2d 708, 709 (N.D. 1983). The *Anderson* court reversed and remanded the case. *Id. See also* N.D. CENT. CODE § 28-01-18 (Supp. 1983). North Dakota's statute of limitations for malpractice is two years. *Id.* It begins to run at the time the cause of action accrues but may not extend beyond six years of the act or omission of alleged malpractice. *Id.*

495. 333 N.W.2d at 709.

496. *Id.* The district court dismissed Anderson's complaint against the defendants because the statute of limitations had run. *Id.*

497. *Id.* Anderson argued that the statute of limitations accrued at the time the plaintiff discovered, or by reasonable diligence could discover, that she had been injured, that the injury was caused by the treatment received, and that it was reasonably probable that the treatment was negligently administered. *Id.* Anderson alleged that she did not discover that Dr. Shook might have been negligent until 1980. *Id.*

498. *Id.* at 712. The court reasoned that the injustice of barring a plaintiff's claim before she reasonably could be aware of it was obvious. *Id.*

499. *Id.* (quoting N.D. CENT. CODE § 28-01-18 (Supp. 1983)).

500. 333 N.W.2d at 709. The court recognized the legislative policies behind the statute of limitations rule, which included attempting to compensate all victims of medical negligence, stimulating activity, and punishing neglect before faded memories, dead or unavailable witnesses, and lost or destroyed evidence could cause difficulties in defending claims. *Id.*

501. 333 N.W.2d at 710 (citing Iverson v. Lancaster, 158 N.W.2d 507, 510 (N.D. 1968)).

and of the defendant's possible negligence before the cause of action would accrue.[502]

Phillips Fur & Wool Co. v. Bailey

In *Phillips Fur & Wool Co. v. Bailey*[503] Phillips appealed from a summary judgment dismissing a legal malpractice action on the ground that it was barred by the statute of limitations.[504] The malpractice suit attributed acts of malfeasance and nonfeasance to Bailey while acting as Phillips' attorney.[505] The alleged malfeasance consisted of Bailey wrongfully agreeing to the removal of a railroad spur line serving Phillips' scrap iron business.[506] This event allegedly took place during the week of August 6, 1978.[507] The alleged nonfeasance consisted of Bailey wrongfully failing to inform the Phillips of the railroad's plan to remove the spur line until it was too late to do anything about it.[508] The Phillips alleged damage to their scrap iron business attributable to Bailey's acts of malfeasance and nonfeasance.[509] The Phillips commenced the suit on or after March 17, 1981.[510] The district court granted a summary judgment dismissing the suit on the ground that the suit was barred by the applicable statute of limitations.[511]

The *Phillips* court held that an issue of fact existed concerning the time at which Phillips could have discovered the alleged injury through reasonable diligence.[512] Therefore, the supreme court reversed the district court's summary judgment and remanded the matter for trial.[513] The *Phillips* court recognized that the discovery rule was first applied in malpractice in *Iverson v. Lancaster*.[514] The *Phillips* court saw no reason to extend the applicability of the six-year discovery period to legal malpractice.[515]

In *Anderson v. Shook*[516] the court recognized the injustice of barring a plaintiff's medical malpractice claim before it could

502. 333 N.W.2d at 712.
503. 340 N.W.2d 448 (N.D. 1983).
504. Phillips Fur & Wool Co. v. Bailey, 340 N.W.2d 448 (N.D. 1983).
505. *Id.*
506. *Id.*
507. *Id.*
508. *Id.*
509. *Id.*
510. *Id.*
511. *Id.* The applicable statute of limitations is at § 28-01-18(3) of the North Dakota Century Code, which provides that a legal malpractice suit is barred unless a party commences the action within two years after the cause of action accrues. *See* N.D. CENT. CODE § 28-01-18(3) (1981).
512. 340 N.W.2d at 449.
513. *Id.*
514. 158 N.W.2d 507 (N.D. 1968).
515. 340 N.W.2d at 449.
516. 333 N.W.2d 708, 712 (N.D. 1983).

reasonably be discovered. The *Phillips* court saw no reason not to extend this principle to legal malpractice and held that the statute of limitations begins to run when the plaintiff knows, or with reasonable diligence should know, (1) of the injury, (2) its cause, and (3) defendant's possible negligence.[517] The *Phillips* court concluded that Bailey did not meet the standard necessary for a summary judgment because the fact issue of whether the statute of limitations had run remained unanswered.[518]

WORKMEN'S COMPENSATION

Layman v. Braunschweigische Maschinenbauanstalt, Inc.

Braunschweigische Maschinenbauanstalt, Inc. (BMA) designed and built a sugar beet plant for Minn-Dak Farmers Cooperative.[519] Layman injured himself when he backed into an unguarded rotating shaft on a crystallizer in the plant.[520] Layman received workmen's compensation in the amount of $18,779.74 for the injury.[521] He then brought suit against BMA.[522] The district court found damages in the amount of $71,851.37, but reduced BMA's liability to $17,962.88 because it found BMA twenty-five percent negligent and Minn-Dak seventy-five percent negligent.[523] both Layman and BMA appealed raising three issues for the North Dakota Supreme Court to decide.[524]

The first issue was whether Layman must establish that he was privy to the construction contract between BMA and Minn-Dak in order to recover for the negligent performance of that contract.[525] The court, relying on the treatment of this issue in American Jurisprudence (Second) held that an employee need not be privy to the contract in order to sue a contractor for the negligent construction of a workplace.[526] The court noted that the negligence is not based on the contractual promise, but rather on the duty to use ordinary care in performing the contractual promise.[527]

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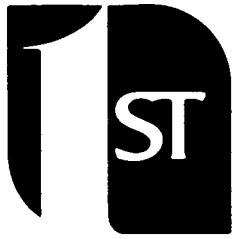
517. 340 N.W.2d at 449.
518. *Id.*
519. Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334, 336 (N.D. 1983).
520. *Id.* at 337.
521. *Id.* at 338.
522. *Id.*
523. *Id.*
524. *Id.* at 339.
525. *Id.* at 340.
526. *Id.* at 344. *See* 57 AM. JUR. 2D *Negligence* § 48 (1971).
527. 343 N.W.2d at 341.

The second issue was whether sufficient evidence existed to support the trial court's findings that BMA had a duty to Layman, that it negligently breached that duty, and that it proximately caused Layman's injuries.[528] The court noted that these were factual findings and thus could not be overturned unless they were clearly erroneous.[529] The court stated that "a finding is clearly erroneous only when, although there is some evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made."[530] The court reviewed the findings of the district court in light of the evidence and found that none of them were clearly erroneous.[531]

The third issue was whether the trial court correctly reduced Layman's recovery against BMA because of Minn-Dak's negligence.[532] Layman could bring suit only against BMA because his exclusive remedy against Minn-Dak was under the workmen's compensation statutes.[533] BMA argued that this case was similar to *Bartels v. City of Williston*,[534] in which the court held that a plaintiff who gave one tortfeasor a release from liability, thereby waived the joint and several liability provision of the comparative negligence statute.[535] The *Layman* court noted that *Bartels* involved a direct conflict between section 32-38-04(1) of the North Dakota Century Code, which provides for a reduction of claims against co-tortfeasors when the plaintiff releases one of the tortfeasors and section 9-10-07, which provides for joint and several liability.[536] The court found that no conflict existed in the present case and held that the joint and several liability clause of the comparative negligence statute controlled and, therefore, the apportionment of damages by the trial court was incorrect.[537]

528. *Id.* at 339.
529. *Id. See* N.D.R. CIV. P. 52(a).
530. 343 N.W.2d at 339.
531. *Id.* at 339-44.
532. *Id.* at 344.
533. *Id. See* N.D. CENT. CODE § 65-05-06 (1960).
534. 343 N.W.2d at 349; *See* Bartels v. City of Williston, 276 N.W.2d 113 (1979).
535. *Id.* at 122. *See* N.D. CENT. CODE § 9-10-07 (1975) (when two or more tortfeasors are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided that each shall remain jointly and severally liable for the whole award).
536. 343 N.W.2d at 349-50. *Compare* N.D. CENT. CODE § 32-38-04(1) (1976) (discharge of one tortfeasor from liability does not discharge other tortfeasors, but reduces the claim against the others) *with id.* § 9-10-07 (1975) (for contribution among tortfeasors, each shall remain jointly and severally liable).
537. 343 N.W.2d at 350.



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